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**Promotion and protection of human rights: human rights
situations and reports of special rapporteurs and representatives**

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with General Assembly resolution 67/175.

* A/68/150.



Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas

Summary

The present progress report should be read in conjunction with the report of the Independent Expert to the Human Rights Council (A/HRC/24/38). Whereas the mandate calls for a broad analysis of obstacles to a democratic and equitable international order entailing a synthesis of civil, cultural, economic, political and social rights, each report has limited focus. Progressively, the annual reports will address the vast scope of the mandate and offer implementable recommendations based on the pertinent resolutions. The present report explores constructive initiatives, for example, promotion of the right to peace, international cooperation, Security Council reform, enhanced participation of States and civil society in global decision-making, including through a World Parliamentary Assembly, and enforcement mechanisms.

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I. Introduction

1. The present progress report on the implementation of General Assembly resolution 67/175 is submitted with reference to Human Rights Council resolutions 18/6 and 21/9 and Assembly resolutions 66/159, 65/223, 64/157, 63/189, 61/160, 59/193, 57/213 and 56/151, which reaffirm, *inter alia*, State commitments to save succeeding generations from the scourge of war, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, to promote social progress and better standards of life in larger freedom, to practise tolerance and good-neighbourliness, and to employ international machinery for the promotion of the economic and social advancement of all peoples.

2. Earlier reports to the Human Rights Council and General Assembly identify numerous obstacles to the achievement of this order. The present report discusses other obstacles and explores processes to overcome them. Promising initiatives include proposals to enhance participation of States and civil society in global decision-making through United Nations reform, a World Parliamentary Assembly, the strengthening of enforcement mechanisms, and the establishment of a World Court of Human Rights. The recognition of peace not only as a principle but as a human right supports this vision. Strengthening pluralistic and unbiased information and communications is another necessary corollary for the realization of an international order that is democratic and equitable. The Independent Expert believes that these initiatives may help to redress systemic human rights violations resulting from the obstacles identified.

3. The present report is not limited to the period following the submission of the initial report (A/67/277) and presents a preliminary analysis of global trends and developments, formulating recommendations additional to those made in the report to the Human Rights Council, which focuses mainly on the issue of participation highlighted in paragraph 17 of Council resolution 21/9 and in paragraph 4 (h) of General Assembly resolution 67/175.

4. The Independent Expert understands his mandate as global in geographical scope and multi-level in conceptual approach, aiming at producing a coherent synthesis of civil, cultural, economic, political and social rights that may contribute to a convergence of ends and means.

II. Activities

5. In the period from 1 August 2012 to 30 July 2013, the Independent Expert deployed numerous mandate-related activities, sent two questionnaires to States, intergovernmental organizations, national human rights institutions and non-governmental organizations, and examined communications received from non-governmental organizations and individuals. He participated in side events during three sessions of the Human Rights Council, interacted with think tanks and academic institutions, held two expert consultations and issued pertinent press releases, several jointly with other mandate holders. In addition to the activities described in the report of the Independent Expert to the Council (A/HRC/24/38), the Independent Expert participated in the annual meeting of special procedures mandate holders in Vienna and in the conference hosted by the Government of

Austria to review progress since the adoption of the 1993 Vienna Declaration and Programme of Action. He drew insights from the workshops on the post-2015 development agenda and on enforcement mechanisms, paying attention also to the papers submitted to the International Conference on Population and Development International Conference on Human Rights¹ held in the Netherlands in July 2013 and the first session of the working group on the rights of peasants and other people working in rural areas² held in Geneva in July 2013. He also incorporated elements of discussions at various World Social Forums.

III. Civil society initiatives

A. Promoting all human rights, including the right to peace

6. Moving the human rights agenda forward requires the promotion of a social and economic environment conducive to respect for human dignity. It is patent that individuals subjected to violence, coercion and war cannot fully exercise their rights. It is thus important to reaffirm the credo of the Charter of the United Nations that peace is a condition for the enjoyment of all human rights.

7. In February 2013, the Independent Expert attended the first session of the Human Rights Council's Open-ended Intergovernmental Working Group on the Draft United Nations Declaration on the Right to Peace.³ He was invited to take the floor and agreed with some speakers that the Working Group's mandate encompasses the progressive development of international law and mechanisms of implementation, for law is a living instrument. Here lies the added value of the Declaration as dynamic development, not mere reaffirmation of norms. It is indicative of the increased role played by civil society that this standard-setting exercise was spearheaded not by Governments but by scholars,⁴ in response to the worldwide aspiration of individuals and peoples to live in peace. This confirms the spirit of the Charter of the United Nations, which begins with the words "We the Peoples".

8. At the session, some delegates expressed scepticism about the legal basis of the right to peace. Some participants, however, pointed out that the legal basis rests on the Charter's preamble and Articles 1 and 2, as well as on General Assembly resolutions, including resolution 2625 (XXV) (friendly relations) and resolution 3314 (XXIX) (definition of aggression). Legal basis is also provided by article 28 of the Universal Declaration of Human Rights, which stipulates that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized, and by the United Nations human rights treaties. Many of the elements of the right to peace have been codified as articles of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other United Nations treaties. While

¹ See http://humanrights.icpdbeeyond2014.org.php53-3.dfw1-2.websitetestlink.com/uploads/browser/files/human_rights_conference_chair_reflections_final_version.pdf.

² See <http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/FirstSession.aspx>.

³ See <http://www.ohchr.org/EN/HRBodies/HRC/RightPeace/Pages/WGDraftUNDeclarationontheRighttoPeace.aspx>.

⁴ See Carlos Villán Durán, International Observatory on the Human Right to Peace, *El derecho humano a la Paz: de la teoría a la práctica* (Oviedo, CIDEAL Foundation for Cooperation and Research, 2013). See <http://www.aedidh.org>.

some States still harbour doubts about the justiciability of the right to peace as a norm of international law, participants indicated that constitutive elements of the right to peace already exist and that a significant body of regional and international jurisprudence has emerged.

9. Seen from the perspective of individual rights, the Human Rights Committee is competent to examine individual complaints⁵ concerning violations of the International Covenant on Civil and Political Rights. Thus, a breach of the right to life such as extrajudicial executions and potentially also illegal wars can be considered as a breach of article 6. Bearing in mind that two general comments on article 6 and general comment No. 29 on states of emergency postulate the State obligation to disarmament, a test case in this context may be justiciable. Threats to the right to peace may potentially be examined under article 9, which imposes on the State an obligation to ensure security of the person. Freedom to engage in anti-war activities, to demonstrate for peace and to create pacifist organizations is protected under articles 19, 21 and 22. The prohibition of the recruitment of children as soldiers in armed conflicts breaches article 24 and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and will be justiciable under the third protocol to the Convention when it enters into force. The right of conscientious objection to military service has been repeatedly affirmed in the general comments of the Human Rights Committee and case law as inherent to article 18, which stipulates the right to freedom of conviction and belief. Conscientious objectors and other persons have the right to leave any country, including their own, pursuant to article 12. Persons who have fled armed conflict and persecution or who have left their countries of origin because of conscientious objection have a right to seek asylum; as refugees, they have a right not to be subjected to refoulement, a right protected under article 7 of the International Covenant on Civil and Political Rights, article 3 of the Convention against Torture and the 1951 Convention relating to the Status of Refugees. They also have the right to return in safety and dignity to their countries of origin pursuant to article 12 of the International Covenant on Civil and Political Rights. Propaganda for war is specifically prohibited under article 20 of the Covenant. The liability of State officials for warmongering and State responsibility for incitement by non-State actors may be considered by the Human Rights Committee under the State reporting and the Optional Protocol procedures. In case of violation of these constitutive elements of the right to peace, victims have a right to a remedy under article 2 of the Covenant.

10. The human right to peace also has important economic, social and cultural components. Following the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on 5 May 2013, individuals can invoke violations before the Committee on Economic, Social and Cultural Rights. Thus, the right to, inter alia, health, a safe environment, food, water and education has acquired even more resonance in the life of each individual.

11. Attention must be given to the penal consequences of violations of the right to peace, including the punishment by domestic courts or in due time by the International Criminal Court of those who have engaged in aggression and propaganda for war.

⁵ See Jakob Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law, 1977-2008: A Handbook* (N.P. Engel, Publisher, 2009).

12. Developing a culture of peace requires education for peace. Everyone — not only children — should be educated in compromise, cooperation, empathy, solidarity, compassion, restoration, mediation and reconciliation.⁶ Negotiation skills must be taught so as to prevent breaches of the peace and other forms of violence as well as to ensure a peaceful continuation of life after conflict. A philosophical paradigm change is necessary to break out of the prevailing culture of violence, the logic of power, practices of economic exploitation, cultural imperialism and impunity. A road map to this culture of peace entails a strategy to identify and remove obstacles, among which are the arms race, unilateralism and the tendency to apply international law à la carte.

13. It is encouraging that some countries have specific provisions on peace in their Constitutions,⁷ and that pertinent national case law has emerged.⁸

14. The human right to peace as a collective and individual right logically derives from the Charter of the United Nations and other treaties. It is strengthened by the Nuremberg and Tokyo precedents condemning crimes against peace and by the definition of aggression adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court. The Independent Expert is persuaded that recognition of peace as a human right will promote a democratic and equitable international order and that national and international democratization will reduce conflict, since peoples want peace. It is Governments that stumble into war.

B. Participation in decision-making processes, including through the reform of United Nations bodies

15. Scholars have produced numerous studies concerning the modalities of reforming the United Nations. While many believe that reform is necessary for the stability and credibility of the system, there is no consensus on the reforms that should be undertaken, nor a road map thereto.

16. In 2013, the United Nations University is publishing a book by Joseph Schwartzberg entitled *Transforming the United Nations System: Designs for a Workable World*. The book discusses the need for voting reform in the General Assembly, the possibility of a weighted voting system, proposals for a popularly elected World Parliamentary Assembly of civil society representatives, options on how best to reform the Security Council, increasing its membership and eliminating the veto, a transformation from the Economic and Social Council to a new structure of regional caucuses, a strengthened Human Rights Council, the coordination of

⁶ In 1997, Costa Rica adopted the Law on the Alternative Resolution of Conflicts and Promotion of Social Peace, requiring peace education in every school and establishing the legal basis for alternative methods of conflict resolution.

⁷ Article 9 of the Constitution of Japan stipulates: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes."

Article 12 of the Costa Rican Constitution stipulates: "The Army as a permanent institution is abolished."

⁸ Costa Rican lawyer Luis Roberto Zamora filed a suit against the participation of Costa Rica in the "Coalition of the Willing". In 2004 the Supreme Court of Costa Rica held it to be against the Constitution, Costa Rica's neutrality declaration, international law and the United Nations system. See judgement No. 9992-04. See also Kofi Annan's interview on the illegality of the Iraq war, available from <http://www.un.org/apps/news/story.asp?NewsID=11953&>.

specialized agencies, funds and commissions of the United Nations system, and enhanced participation of non-governmental organizations and other non-State actors.

17. In the opinion of the Independent Expert, this book, replete with statistics and tables, provides a credible architecture for global governance and explains how to go about reforms that will advance the goal of building a democratic and equitable order.

18. The unfair composition of the Security Council is largely acknowledged. The principal defects are the anachronistic privileges of the five permanent members of the Council and the Council's insufficient representativeness. Mr. Schwartzberg has proposed an increase in membership, divided into 12 regional seats, each with a weighted vote. He employs a simple mathematical formula that would allow a small, objectively determined number of leading States to hold Council seats in their own right, while the remaining seats would be allocated to multinational regions. Mr. Schwartzberg argues that a fairer voting system in both the General Assembly and the Security Council would enhance the legitimacy of United Nations decisions and contribute to promoting a democratic and equitable international order.

19. Any reform of the Security Council will require an amendment of the Charter of the United Nations under Article 108. Some observers feel that the veto power as practised since 1945 is the Achilles heel of the United Nations and of the contemporary international order. While a majority of United Nations Member States and observer States would agree to amend article 27 (3) of the Charter, this may be blocked by any of the members possessing the power of veto. Abandoning the veto, therefore, will have to envisage a substantial quid pro quo. Mr. Schwartzberg suggests workable trade-offs, for example, by providing for enhanced voting weights for the permanent five in the General Assembly in a reformed and more empowered Assembly.

20. It is not likely that a bargain could now be struck that would allow eliminating the veto privilege by simple Charter amendment. Thus, Mr. Schwartzberg proposes to phase it out in stages, over a transitional period of 15 years. This process could be advanced by gradually increasing the number of permanent five States whose dissenting votes could block resolutions from a single dissenting State to two dissenters and then three, and so forth. Thus, in the first five years of the reform period, two negative votes by permanent five States would constitute a veto, in the next five years three. Moreover, there should be a phased reduction of the range of subjects to which the veto may apply. The first step could be to prohibit a veto by any of the permanent five members in a case in which that member itself is a principal party. Subsequently, vetoes might be proscribed if they concern egregious violations of human rights, especially in respect to genocide and crimes against humanity.⁹ Subsequently, vetoes could be precluded in respect to resolutions calling for the use of inspection teams or monitors in situations deemed to constitute a threat to the peace. Most importantly, any permanent five State exercising the veto power should be required to submit to the General Assembly a detailed legal explanation of its reasons for doing so.

21. While the use of the veto privilege has too often led to human rights violations, it is not the only problem with the operation of the Security Council (which because of its composition remains heavily under the influence of the

⁹ See Ariela Blätter, "The Responsibility not to Veto: A Way Forward", *Minerva*, No. 37, pp. 47-53, www.globalsolutions.org.

permanent members), where majority votes have been secured for resolutions that have actually harmed thousands of victims.

22. It is thus important to recognize that the Security Council cannot be above the Charter or above *jus cogens*, and that its decisions and resolutions must become subject to scrutiny. Some of the grave problems that beset the international order today are attributable to the kind of decisions adopted and the resolutions not adopted by the Security Council. Some observers have pointed out that the Security Council can be, and has been, manipulated into adopting resolutions and decisions that are incompatible with the Council's mandate, defined in Article 24 (2) of the Charter: "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations." In conformity with that provision, if a resolution or decision is contrary to human rights or has results that violate provisions of United Nations human rights treaties, such resolution or decision is *ultra vires*. This could be tested by the General Assembly through referral to the International Court of Justice for an advisory opinion pursuant to Article 96 of the Charter. A priori, there can be no conflict between the Charter and United Nations human rights treaties which could bring Article 103 of the Charter into play. Accordingly, if conflict appears to arise between a Council resolution and United Nations human rights treaties, the compatibility of the resolution with the purposes and principles of the United Nations could be tested.¹⁰

C. World Parliamentary Assembly

23. Among other civil society initiatives, the launching of a World Parliamentary Assembly¹¹ or United Nations Parliamentary Assembly is worth exploring. As former Secretary-General Boutros Boutros-Ghali stated: "A United Nations Parliamentary Assembly — a global body of elected representatives — could invigorate our institutions of global governance with unprecedented democratic legitimacy, transparency and accountability."¹²

24. The idea is to remedy democracy deficits by giving voice to global public opinion, including citizens in global decision-making through elected officials. Such an Assembly could be set up by a vote of the General Assembly under Article 22 of the Charter or it could be created on the basis of a new international treaty between Governments, followed by an agreement linking it to the United Nations. Neither mechanism requires Charter amendment or reform. Global decisions would gain greater legitimacy through citizen input and involvement in an independent World Assembly with consultative functions, or in a United Nations Parliamentary Assembly representing people as well as States.

¹⁰ See the Views of the Human Rights Committee in the *Sayadi and Vinck v. Belgium* case, Communication No. 1472/2006, holding that the application of Security Council sanctions by Belgium entailed the violation of articles 12 and 17 of the International Covenant on Civil and Political Rights. Jakob Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook*, chap. VII, pp. 526, 527, 530-533 (N.P. Engel, Publisher, 2009).

¹¹ See Joseph Schwartzberg, *Creating a World Parliamentary Assembly* (Committee for a Democratic United Nations, Berlin, 2012); Richard Falk and Andrew Strauss, "Toward Global Parliament", *Foreign Affairs* (Jan/Feb 2001). See <http://ssrn.com/abstract=1130417>.

¹² See <http://www.opendemocracy.net/article/boutros-boutros-ghali/UN-parliament-global-democracy>.

25. On 16 May 2013, the Independent Expert convened an expert consultation to discuss aspects of the mandate. In a statement delivered at the meeting, the representative of the Campaign for a United Nations Parliamentary Assembly, Andreas Bummel, stressed that democratization of the international order should aim at promoting the dignity and worth of every person and the equality of all world citizens. Bearing in mind that the United Nations is a State-based organization, Mr. Bummel noted that the challenge is to find ways to create a space within this setup that nonetheless allows connecting global decision-making more directly with the world's citizens as individuals. A parliamentary body will give the world's citizens a voice at the United Nations through more direct representation. The members of this new body could be designated by existing parliaments, or countries could choose to have them directly elected. Referring to the parliamentary organs of the European Union, the Council of Europe and the African Union, Mr. Bummel emphasized that such a new body in no way would contradict the intergovernmental nature of the United Nations. With reference to ongoing international discussions on post-2015 development goals, Mr. Bummel stated that steps towards citizen-based global democratic governance should be part of the new framework and that serious consideration should be given to the contribution that a parliamentary assembly at the United Nations could make to the mechanisms which can assure accountability, reporting, monitoring and continued dialogue regarding the fulfilment of the post-2015 goals.¹³

D. Strengthening enforcement mechanisms

26. For centuries, thinkers in all civilizations have affirmed principles of natural justice and called for an evolution of law from positivistic power-consolidating norms to more humanistic systems where the law serves justice and protects the weak. Domestic and international tribunals have a responsibility to enforce justice and equity and not merely bolster the status quo.

27. At the expert consultation convened on 6 June 2013 by the Independent Expert, which focused on enforcement mechanisms, participants noted that the International Court of Justice has jurisdiction over States and adopts advisory opinions requested by the General Assembly and the Security Council that shape the international order. Pursuant to article 38 (2) of its Statute, the Court can decide *ex aequo et bono* and has issued judgments and advisory opinions concerning human rights. However, it is not a world court of human rights.

28. Individuals have no standing before the International Court of Justice and are limited to regional human rights tribunals and the quasi-judicial United Nations treaty bodies, which do not enjoy universal acceptance and whose decisions are enforced depending on the political will of the States parties. Experience shows that the failure to implement Human Rights Committee decisions is sometimes not attributable to the refusal of the State concerned to do so, or its rejection of the

¹³ See <http://en.unpacampaign.org/news/700.php>. See also Andreas Bummel, *Developing International Democracy: For a Parliamentary Assembly at the United Nations* (Berlin, Committee for a Democratic U.N., 2010); Andreas Bummel, "The Composition of a Parliamentary Assembly at the United Nations", Background paper No. 3 (Berlin, Committee for a Democratic U.N., 2010); Dieter Heinrich, *The Case for a United Nations Parliamentary Assembly* (Berlin, Committee for a Democratic U.N., 2010).

Committee's rationale, but is explainable by the absence of enabling legislation granting Committee decisions enforceable status in the domestic legal order. No national judge can execute Committee decisions unless they are transformed into domestically enforceable orders. Some countries like Colombia have chosen a "half-way house" arrangement, whereby a ministerial committee examines decisions to determine which Ministry will implement them — finance, justice, education (see Law No. 288 of 1996). It is the responsibility of every State that ratifies human rights treaties to adopt the necessary domestic legislation to render them executable. Therefore, the Independent Expert urges States to adopt enforcement legislation and suggests that the Office of the United Nations High Commissioner for Human Rights (OHCHR) draft model legislation and propose it to States parties, offering advisory services and technical assistance for its adjustment and enactment.

29. Following the establishment in 2002 of the International Criminal Court, which promises a mechanism of penal accountability, civil society has restarted a debate about the old aspiration to create a World Court of Human Rights.¹⁴ In connection with the 2008 Swiss Initiative to Commemorate the Sixtieth Anniversary of the Adoption of the Universal Declaration of Human Rights,¹⁵ a panel of eminent scholars drew up an Agenda for Human Rights envisaging the establishment of a World Court of Human Rights.¹⁶ After the publication of a draft statute, the project was entrusted to the Graduate Institute of International and Development Studies of the University of Geneva and to the International Commission of Jurists.¹⁷ The idea is supported by numerous non-governmental organizations, including the International Bill of Rights Association.¹⁸

30. At the Second World Conference on Human Rights, held in Vienna in June 2013, a workshop chaired by Manfred Nowak,¹⁹ entitled "Strengthening the Rule of Law", was devoted to enforcement mechanisms, including the creation of a World Court of Human Rights. There are different models for such a court, which may rely on existing human rights treaties or attempt a consolidation of all treaties into one instrument encompassing not only the rights enunciated in the Universal Declaration of Human Rights but also in the core United Nations human rights treaties. Meanwhile, regional human rights courts are laying solid groundwork for the World Court.

31. The workshop revisited the relevant sections of the Vienna Declaration and Programme of Action, emphasizing the rule of law as a prerequisite for the effective protection of human rights. Such recognition is reflected in the right of all victims

¹⁴ See Justice Michael Kirby, "Herbert Vere Evatt, The United Nations and the Universal Declaration of Human Rights after 60 years", University of Sydney, Australia, available from http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_14aug08.pdf; A. de Zayas, "The United Nations Human Rights Committee: An emerging international court of human rights", *Peoples for Human Rights, IMADR Yearbook* (International Movement Against All Forms of Discrimination and Racism, 1989) pp. 7-15; A. de Zayas, "An International Court of Human Rights", *Nordic Journal of International Law*, 1994, pp. 267-271; J. Kirk Boyd, 2048: *Humanity's Agreement to Live Together* (San Francisco, Berrett-Koehler Publishers, 2010) pp. 188-190. See <http://www.worldgovernment.org/wsalstat.html>.

¹⁵ See <http://www.udhr60.ch/>.

¹⁶ See <http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf>.

¹⁷ See <http://www.udhr60.ch/docs/World-court-final1211%20.pdf>.

¹⁸ See <http://www.internationalbillofrights.org/>; A/HRC/19/NGO/124.

¹⁹ See Manfred Nowak, "On the Creation of a World Court of Human Rights" (April 6, 2012). *National Taiwan University Law Review* 7(1).

of human rights violations to an effective remedy and adequate reparation for harm suffered. The fact that individuals have become subjects of international law and bearers of rights is revolutionary, as is their ability to call Governments to account by lodging individual complaints before the United Nations treaty bodies.

32. In order to better monitor respect for human rights treaties and strengthen enforcement mechanisms, the workshop on the post-2015 development agenda considered the possibility that the universal periodic review process of the Human Rights Council should be broadened so as to examine reports and engage in interactive dialogue with financial institutions such as the World Bank and the International Monetary Fund and intergovernmental organizations such as the World Trade Organization. It was suggested that these institutions could be gradually incorporated into the United Nations system pursuant to Articles 57 and 63 of the Charter, so as to contribute to the transparency and accountability necessary for a democratic and equitable international order.

IV. Obstacles

A. Systemic deficits in democracy and equity

33. The Independent Expert's reports to the Human Rights Council and his earlier report to the General Assembly identify obstacles of a general nature that should be addressed by States individually and in cooperation with each other. The absence of adequate democratic participation in domestic and international decision-making is aggravated by the asymmetry of financial power, trade imbalances, the imposition of neoliberal postulates by commerce and financial institutions,²⁰ vestiges of imperial mentality vis-à-vis "unpeople",²¹ corrupt governance, ethnic and religious rhetoric legitimizing violence, the "abuse of reality" often called history,²² and most importantly, lack of respect for the rule of law and widespread impunity. Systematic disenfranchisement of women, minorities, indigenous peoples and peoples under occupation, as well as violations of the self-determination of peoples, manifest themselves in multiple ways, notwithstanding ubiquitous lip service to hollowed-out concepts, including self-determination and permanent sovereignty over natural resources. Observers deplore the instrumentalization of human rights and humanitarian sentiment for cynical reasons of realpolitik, as well

²⁰ Noam Chomsky observes that powerful economies were built on protectionism. However, after achieving dominion, they demanded competition on a "level playing field", sharply tilted in their favour. This is like "kicking away the ladder" so that no developing country can follow, imposing inequitable game rules, disadvantageous domestic arrangements and unfair trade. See Noam Chomsky, *Hopes and Prospects* (Chicago, Haymarket Books, 2010) p. 76; Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London, Anthem Press, 2002); Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011); Martin Khor, *Implications of some WTO Rules on the realization of the MDGs*, Trade and Development Series No. 26 (Penang, Malaysia, Third World Network, 2005); Martin Khor, "The Impact of Liberalization on Agriculture in Developing Countries: Ghana's experience" (2008); Yilmaz Akyüz, *The WTO Negotiations on Industrial Tariffs: What is at Stake for Developing countries?*, Trade and Development Series No. 24 (Penang, Malaysia, Third World Network, 2005).

²¹ See Mark Curtis, *Unpeople* (London, Vintage, 2004); John Pilger, *Hidden Agendas* (London, Vintage, 1999).

²² See Noam Chomsky, *Hopes and Prospects* (Chicago, Haymarket Books, 2010) p. 267.

as subtle and not so subtle attempts to hijack the United Nations away from its peacemaking mandate towards belligerent agendas.

34. Reinhold Niebuhr tells us that man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary.²³ Yet, democracy means different things to different people. It is more than the ballot box, more than just majority rule. It means participation in decision-making and the opportunity to choose policy. The right to vote is only a tool to exercise democracy. Each Government is invited to answer how the wishes of their respective populations are determined in practice and what level of popular participation in decision-making exists. More concretely, how often are decisions taken or laws enacted that, if submitted to public scrutiny, would be rejected?

35. A neutral observer would have no difficulty in identifying instances of disconnect between government and people, most obviously in authoritarian and totalitarian regimes where civil society's voices are muzzled and where peaceful protests are prohibited or severely suppressed,²⁴ but also to a lesser degree in democracies, particularly "representative democracies" that do not genuinely represent, business-driven democracies and so-called "lobby-democracies", where elected officials tend to be more responsive to the lobbies than to the population. Observers stress that democratic institutions must be more than mere formalities²⁵ and note the absence of the mechanisms of direct democracy, including referendums on major issues including budget priorities. Democracies must be based on a Constitution, checks and balances and an independent judiciary, lest democracy be abused and the rule of law and democracy itself be destroyed.

36. Another area of disconnect concerns the privatization of public services. It is obvious that since the privatization of enterprises transfers them from the public to the private domain, democratic control of their activities is lost, decisions that affect peoples' lives being removed from the public arena to a corporate boardroom. While the preferred argument for privatization is that it furthers efficiency, there is evidence that in many instances this is not the case and it leads to unemployment and inequity. An eloquent illustration of the undemocratic state of the prevailing international order is the impotent outrage of civil society at the machinations accompanying the 2007-2008 financial meltdown and the undemocratic rescue of the culprits, who not only benefited from impunity but remained in place as if it were "business as usual". Hence, it appears that so-called neoliberal economic reform, market fundamentalism and financial deregulation do not further but undermine effective democracy.

37. At the aforementioned workshop on post-2015 development agendas, held at the Second World Conference on Human Rights, in Vienna, participants flagged the adverse impacts of resource- and land-grabbing in many countries, which affect indigenous peoples and peasants in particular. Globalization should serve people rather than the interests of investors and financial institutions.

²³ See Reinhold Niebuhr, *The Children of Light and the Children of Darkness* (University of Chicago Press, 1944).

²⁴ See the reports of the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

²⁵ See Noam Chomsky, *Hopes and Prospects* (Chicago, Haymarket Books, 2010).

38. Lack of budget and fiscal transparency constitutes a major challenge both to democracy and equity. It was observed that many State budgets are oriented towards military expenditures without free and informed consent by the public. If citizens had an opportunity through a measure of direct democracy to influence budgets (for example, if they could vote for or against expenditures on drones, missiles and submarines), they would probably vote against and propose instead a recycling of workers from the war industries into the public service domain, reorienting resources and workforce towards education, health care, food security and infrastructure. If they could vote for the allocation of funds for research and development, they would likely vote for research into sustainable energy and efficient uses of technology rather than for research into nuclear energy or for military-related technologies. However, none of these issues are properly presented to the public for their consideration, and decisions are taken by politicians already committed to the military-industrial complex and other lobbies.

39. Participants deplored so-called austerity measures as retrogression in human rights, in contravention of articles 2 and 5 of the International Covenant on Economic, Social and Cultural Rights, imposed top-down and never legitimized by popular referendum. Moreover, the "bail-out" of the banking system²⁶ was undemocratic and inequitable because a "private debt" was rescued through public money, namely, by increasing the public debt, at the expense of social justice. The general feeling of malaise was expressed in the statement that Governments seem to have adopted the elitist view that "banks are too big to fail and bankers too big to jail", concern being expressed about the dangers of privatization²⁷ of essential services, including water, and the widespread phenomenon of privatizing profit and socializing cost.

B. Unilateralism

40. In April 2013, OHCHR, pursuant to Human Rights Council resolution 19/32, organized a workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations in the States targeted (see A/HRC/24/20). The workshop focused not only on unilateral measures, but also on coercive measures by regional groups without Security Council clearance, questioning their legality and legitimacy in the context of existing human rights obligations by the States imposing them. Participants noted the violation of sovereignty through threats or the imposition of economic sanctions in the name of human rights. They recalled general comment No. 8 of the Committee on Economic, Social and Cultural Rights, which states that economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally and that sanctions often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work (see E/C.12/1997/8). Reference was made to the 1993 Vienna Declaration and Programme of Action,

²⁶ See John Eatwell and Lance Taylor, *Global Finance at Risk: The Case for International Regulation* (New York, New Press, 2000); Barry Eichengreen, "Fortifying the Financial Architecture: Unanswered Questions", *Current History*, vol. 109, No. 723 (January 2010).

²⁷ See J. T. Temperman, "Public Participation in Times of Privatization: A Human Rights Analysis" (2011) 4(2), *Erasmus Law Review*, pp. 43-69.

which calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services.²⁸

41. A number of speakers argued that unilateral coercive measures constituted violations of the Charter, the International Covenant on Economic, Social and Cultural Rights and the multilateral trading system, adversely affecting the right to development. In particular, sanctions on the transfer of funds had prevented the importation of food and medicine. The 2012 thematic report by the High Commissioner for Human Rights was cited, stressing that coercive measures should be of limited duration, proportional and subject to human rights safeguards, including impact assessments and monitoring conducted by independent experts (see A/HRC/19/33, para. 38). Marc Bossuyt, President of the Constitutional Court of Belgium, observed that sanctions regimes must be periodically evaluated.

42. The then Chairperson of the Committee on Economic, Social and Cultural Rights, Ariranga Pillay, indicated that some coercive measures had extraterritorial effects that raised international law questions. Participants stressed that unilateral coercive measures created a regime of structural violence with disproportionate impacts on women and children, undermining the rule of law, constituting an obstacle to self-determination, infringing sovereign rights, jeopardizing peace, security and the human rights of ordinary people. The former President of the Human Rights Council, Ambassador Laura Dupuy Lasserre, noted that the Council had been seized of situations involving unlawful coercive measures, including the blockade of Gaza, the United States base at Guantánamo, targeted killings of non-State actors and the supply of weapons to parties in internal armed conflicts. Some participants proposed that the Council draw up guidelines to prevent, minimize and redress the adverse impacts of unilateral measures, establishing a special procedure to monitor them and ensure accountability.

43. In a 2012 paper for an earlier workshop on coercive sanctions, Mr. Bossuyt noted that the economic sanctions against Iraq had been imposed by the Security Council in its resolution 661 (1990) of 6 August 1990, followed by a comprehensive arms embargo imposed by its resolution 687 (1991). Over time, those sanctions had been criticized for inflicting huge suffering on the population (see S/2000/208). The Secretary-General himself had said that the population were not the intended targets of sanctions. Mr. Bossuyt concluded that it was not sufficient that the policy of the targeted country justify the imposition of economic sanctions. The impact of sanctions on the enjoyment of human rights by the population should be taken prominently into account. If the desired results could not be attained within a reasonable time period, the measures should be suspended. If not, the sanctions might not only lose their legitimacy, but might also become counterproductive.²⁹

44. Already in 2000, Mr. Bossuyt had reported to the Sub-Commission on the Promotion and Protection of Human Rights on the adverse consequences of economic sanctions on the enjoyment of human rights (see E/CN.4/Sub.2/2000/33), expressing concern that such measures should always be limited in time, should not

²⁸ See <http://www.unhcr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>, para. 31.

²⁹ See http://www.ohchr.org/Documents/Events/WCM/MarcBossuyt_WorkshopUnilateralCoerciveSeminar.pdf.

affect the innocent population, especially the most vulnerable, should not aggravate imbalances in income distribution, nor generate illegal and unethical business practices.

45. Notwithstanding the Sub-Commission's concerns, the sanctions regime against Iraq continued until 2003, causing grave harm to the population, the situation being so serious that officials of the Food and Agriculture Organization of the United Nations (FAO)³⁰ in 1995 and the United Nations Children's Fund (UNICEF) estimated that at least 500,000 children had died as a consequence of the sanctions,³¹ and two Assistant Secretary-Generals of the United Nations, Denis Halliday (1997-1998)³² and Hans-Christof von Sponeck (1998-2000),³³ both of them Humanitarian Coordinators in Iraq, resigned in protest. While these resignations were treated as irrelevant and did not result in the lifting of the sanctions, the great suffering imposed on the Iraqi population eloquently illustrates system dysfunction, incompatible with the purposes and principles of the Charter.³⁴ Peeling the onion of Security Council sanctions on Iraq, one finds not even a thin layer of human rights, but instead power politics as insensitive as in centuries gone by.³⁵ In this context, the General Assembly may consider establishing an ad hoc committee on non-intervention, in the spirit of the Ad Hoc Committee on the Indian Ocean, which was established in 1971 in order to render the Indian Ocean a zone of peace and to persuade the great powers to abstain from further militarization.³⁶

C. Veto privilege

46. An obvious obstacle to a democratic and equitable order is the use and abuse of the veto privilege in the Security Council. To any neutral observer, the record of veto practice over six decades demonstrates that it has often been used inconsistently with the purposes and principles of the Charter, notably against the right of self-determination, and to block sanctions against or mere condemnation of countries and situations that violate United Nations principles.³⁷ The abuse of the veto power has become so predictable that frequently resolutions are not even tabled because of the certainty of a veto against their adoption. Necessary discussion is thereby suppressed. Concerted action by the Security Council, the General Assembly

³⁰ See S. Zaidi and M. C. Smith-Fawzi, "Health of Baghdad's Children", *The Lancet*, vol. 346, No. 8988, 2 December 1995.

See [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(95\)92499-X/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(95)92499-X/fulltext) and http://ac.els-cdn.com/S014067369592499X/1-s2.0-S014067369592499X-main.pdf?_tid=96207b30-f37f-11e2-9b60-00000aach35f&acdnat=1374574188_cd1dd38b2f89967c98330ac1462be4be.

³¹ See Ali MM, Shah IH, "Sanctions and childhood mortality in Iraq", *The Lancet*, vol. 355, No. 9218, pp. 1851-57, 27 May 2000, available from http://ac.els-cdn.com/S0140673600022893/1-s2.0-S0140673600022893-main.pdf?_tid=aacffdf6-f3b8-11e2-a825-00000aab0f02&acdnat=1374598704_cb7484ab864b941dd7a5edb154e32d86.

³² See Noam Chomsky, *Hopes and Prospects* (Chicago, Haymarket Books, 2010).

³³ Hans-Christof von Sponeck, *A Different Kind of War: The UN Sanctions Regime in Iraq* (New York and Oxford, Berghahn Books, 2006).

³⁴ See <http://www.guardian.co.uk/world/2001/nov/29/iraq.comment>.

³⁵ For this aspect, see John Pilger, *The New Rulers of the World* (London 2003).

³⁶ See <http://www.smission.com/news/17-other-news/746-ad-hoc-committee-on-the-indian-ocean.html>.

³⁷ For a 1946-2012 survey see <https://www.gov.uk/government/publications/vetoed-draft-resolutions-in-the-united-nations-security-council-1946-2012>.

and other United Nations agencies is necessary to prevent major human rights violations, stop ongoing breaches and provide remedies to victims.³⁸

D. Threat and use of force

47. Threats of the use of force and the use of force constitute obstacles to the building of a just world order. As Benjamin Ferencz, United States Prosecutor at Nuremberg, observed in his book *Enforcing International Law: A Way to World Peace*: "As an instrumentality for the maintenance of peace and human dignity, the promise of international law exceeds its performance. Law has not yet been able to bring order to the world. All nations pay lip service to prohibiting the use of force, yet very few are prepared unconditionally to abide by their professed restraints."³⁹ It is a tragedy that notwithstanding the Charter of the United Nations, States have not given up predator instincts, that the danse macabre of the weapons manufacturers and traders continues, and that international law is applied à la carte. The adoption by the General Assembly of the landmark Arms Trade Treaty on 2 April 2013 is a step in the right direction.⁴⁰

48. World peace is continually threatened by the paranoia of power, as internal and international conflicts plague humanity. Confronted by the danger of weapons of mass destruction, humanity must take effective measures towards disarmament. Albert Einstein warned us: "I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones."⁴¹

49. Human Rights Council resolution 18/6 establishing the mandate of the Independent Expert lays the foundations for the enhancement of international cooperation for the promotion and protection of human rights, which should be carried out with full respect for the "non-use of force or the threat of force in international relations and non-intervention in matters that are essentially within the domestic jurisdiction of any State".

50. Nevertheless, wars, structural and other forms of coercion persist — expressions of injustices, which should be addressed not only by the States immediately concerned but by the international community in solidarity with each other. The root causes of armed conflict, among them the race for natural resources, economic imbalances, and ethnic and religious tensions must be resolved, respecting the obligation to settle disputes by peaceful means under Article 2 (3) of the Charter. The obligation to negotiate is *jus cogens*, "negotiation" meaning dialogue and compromise, not the dictates of the stronger over the weaker.

E. Information deficits

51. According to Human Rights Council resolution 18/6, the promotion of a free, just, effective and balanced international information and communications order is

³⁸ See <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx> and <http://www.un.org/apps/news/story.asp?NewsID=45519&Cr=Syria&Cr1#.Ufi4ytJ8kIU>.

³⁹ See <http://www.benferencz.org/books/FerenczNewLegalFoundationsforGlobalSurvival.pdf>.

⁴⁰ See <http://www.un.org/disarmament/ATT/>.

⁴¹ See Alice Calaprice, *The new quotable Einstein* (Princeton University Press, 2005), p. 173.

necessary to achieve a democratic international order. Nevertheless, censorship and manipulation are practised in many parts of the world. Totalitarian Governments control news and education and prohibit any form of pluralism. In ostensibly democratic States, Governments interfere at various levels with access to information and academic freedom and freedom to question, including through "memory laws" that pretend to crystallize history and penalize the expression of non-conformist views. Such laws and the abuse in their application hinder freedom of research and have been found by the Human Rights Committee to be incompatible with article 19 of the International Covenant on Civil and Political Rights.⁴²

52. Censorship and skewed reporting is also practised by the private-sector media, which often indoctrinate more effectively than Governments. Citizens and civil society should therefore assert their right to know and demand from their Governments that academic freedom as well as unencumbered access to information be guaranteed, which are essential to develop one's own opinions and exercise responsibly the right of democratic participation.

53. While in totalitarian regimes, government controls the media and criminalizes journalists, bloggers and human rights defenders who do not echo the State's propaganda, in numerous democratic countries, the media are largely in private hands — too few hands. Often media are controlled by conglomerates responsive to corporations and advertisers who determine the content of news and other programmes, frequently disseminating disinformation or suppressing crucial information necessary for democratic discourse. Indeed, the media blackout on important issues constitutes a grave obstacle to democracy, since absent sufficient information and without free and pluralistic media, democracy is dysfunctional and the political process, including elections, becomes a mere formality — not an expression of the will of the people. Some observers compare elections in some countries with sports events, where people are but spectators. Moreover, elections must not be mere interludes for pushing a lever and then retreating to passivity, for democracy demands committed participation in the daily workings of society.⁴³

54. There is a growing feeling that some media have betrayed the public trust. Far from facilitating participation by the people in decision-making, they have contributed to the consolidation of decision-making by oligarchs. In many countries, observers criticize the apparent subservience of the press to the Government, noting the employment of a skewed moral compass and selectivity.⁴⁴ The gulf between public policy and public opinion can be bridged only by informed dialogue, not by slogans and caricatures.

55. Freedom of online and offline media is also linked to the right to privacy stipulated in article 17 of the International Covenant on Civil and Political Rights. The so-called "war on terrorism" since 2001 has eroded a spectrum of civil liberties essential to a democratic and equitable international order. Terrorism⁴⁵ poses a grave threat to a just order. As Secretary-General Ban Ki-moon has said, "Nothing

⁴² See CCPR/C/GC/34 and Alfred de Zayas and Aurea Roldan, "Freedom of Opinion and Freedom of Expression", *Netherlands International Law Review* 2012 (vol. LIX, pp. 425-455).

⁴³ See Noam Chomsky, *Hopes and Prospects* (Chicago, Haymarket Books, 2010), p. 101.

⁴⁴ See David Cromwell, *Why are we the Good Guys? Reclaiming Your Mind from the Delusions of Propaganda* (Zero Press, London 2012); Robert McChesney/John Nichols, *Our Media, Not Theirs: The Democratic Struggle against Corporate Media* (Seven Stories Press, New York, 2002).

⁴⁵ See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13439&LangID=E>.

can justify terrorism — ever. No grievance, no goal, no cause can excuse terrorist acts. At the same time, we must remove the conditions that feed the problem. Terrorism festers where conflicts are endemic ... and where human rights, human dignity and human life are not protected and impunity prevails".⁴⁶ The Independent Expert considers that the answer to terrorism cannot be a huge surveillance system and policies that violate article 17 of the International Covenant on Civil and Political Rights,⁴⁷ nor the criminalization of individuals voicing dissent or minority opinions. What must be researched and remedied are the causes of terrorism, which frequently originate in despair, hopelessness, social injustice and the growing gulf between the super-rich and the extremely poor — problems that will be corrected when there is political will. Fighting rogue terrorism by State terrorism⁴⁸ exacerbates matters and undermines the credibility of international law and ubiquitous commitment to the rule of law. Human rights and security are not in competition but complementary and interdependent.

56. Disclosures about the magnitude of covert State surveillance and well-known examples of intimidation of human rights defenders shock the conscience and require public discussion and corrective action in each country and by the international community. In a democratic society, it is crucial for citizens to know whether their Governments are acting constitutionally or are engaged in policies that violate international law and human rights. It is their civic duty to protest against Government secrecy and cover-ups, the chilling effect of disproportionate surveillance, acts of intimidation and harassment, arbitrary arrests and defamation of human rights defenders, including whistleblowers, as unpatriotic or even traitors, when in fact they may be the most effective defenders of the rule of law. These acts of surveillance and intimidation are hallmarks of totalitarianism, not of democratic governance.

57. The Independent Expert salutes the approach taken in 2009 by the Parliamentary Assembly of the Council of Europe in adopting the Convention on Access to Official Documents (CETS No. 205),⁴⁹ followed by resolution 1838 (2011) on Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations and by the adoption on 24 June 2013 of a report on National security and access to information, stating, *inter alia*: "Most human rights abuses in the context of the 'war on terror' were in fact brought to light through whistleblowers and investigative work by journalists and human rights organizations rather than through parliamentary or judicial oversight mechanisms.... Lack of information on important issues of public interests prevents effective scrutiny and fosters a culture of secrecy and impunity which, in turn, threatens the democratic values upon which our societies rest".⁵⁰ Equally incisive is the text adopted on 12 June 2013 by the Open Society Justice Initiative and 21 other international organizations entitled "Global Principles on National Security and the Right to Information".⁵¹

⁴⁶ See <http://www.unmultimedia.org/radio/english/2013/01/nothing-can-justify-terrorism-ever-ban/>.

⁴⁷ See A/HRC/22/52 and A/HRC/23/40 and Corr.1. See also the press release of the High Commissioner for Human Rights of 12 July 2013 on mass surveillance, available from <http://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true&LangID=E>.

⁴⁸ See http://www.princeton.edu/~achaney/tmve/wiki100k/docs/State_terrorism.html.

⁴⁹ See <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=1&CL=ENG>.

⁵⁰ See http://www.assembly.coe.int/Communication/pressajdoc25_2013.pdf, paras. 9 and 11.

⁵¹ See <http://www.freedominfo.org/2013/06/osi-issues-principles-on-national-security-rti/>.

58. Civil society must take the space it needs to exercise democratic rights, while non-governmental organizations should have greater opportunity to participate in the conduct of domestic affairs and to contribute to the work of the Human Rights Council and other United Nations bodies. Economic and Social Council resolution 1996/31 has proved to be too restrictive, hindering legitimate non-governmental organizations from obtaining consultative status. By contrast, quasi-governmental non-governmental organizations ("GONGOS") have obtained consultative status through the existing scheme. Bearing in mind that the Human Rights Council reports to the General Assembly and not to the Economic and Social Council, as its predecessor did, it would be sensible for the Assembly to issue new rules for granting consultative status to non-governmental organizations.

F. Lack of democratic participation by indigenous and unrepresented peoples

59. On 16 May 2013, the Independent Expert convened an expert consultation on the issue of democratic participation at which indigenous and unrepresented peoples from North and South America, Australia, Asia and the Pacific explained their grievances and made written submissions invoking pertinent General Assembly and Economic and Social Council documents and resolutions.⁵² Participants claimed violations of their right to self-determination, sequels of colonialism and flawed self-determination referendums, organized and conducted by administering and/or occupying Powers to achieve predetermined results. He received related communications meriting study in future reports. Some indigenous groups contended that they are systematically denied effective representation⁵³ and that their involvement in decision-making is pro forma since, regardless of their views, Governments pursue their agendas and only perfunctorily listen to them. In particular, some indigenous groups complained about material breaches of treaties⁵⁴ made by their ancestors with several States, others claimed deception when the treaties were made and, in the few cases where self-determination referendums had been held, they were allegedly rigged.⁵⁵ At the consultation, the experts discussed the reinstatement of French Polynesia under the reporting procedure in Chapter XI of the Charter and the relevance of this precedent to other cases.⁵⁶ Some indigenous and unrepresented peoples expressed concern about being profiled as national

⁵² See E/C.19/2013/12 and General Assembly resolutions 67/157 and 2504 (XXIV).

⁵³ See the statement of the Special Rapporteur on the rights of indigenous peoples at the twelfth session of the Permanent Forum on Indigenous Issues, 22 May 2013. See also A/HRC/21/47/Add.1 and E/C.19/2010/13.

⁵⁴ See [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1999.22.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1999.22.En?Opendocument).

⁵⁵ See, for instance, shadow reports submitted to the Human Rights Council and to the Committee on the Elimination of Racial Discrimination by indigenous groups and the recommendations in the relevant concluding observations at <http://www1.umn.edu/humanrts/usdocs/hruscomments2.html>; paper presented by the Koani Foundation to the expert consultation of 16 May 2013; paper presented by the Indian Council of South America to the World Intellectual Property Organization, dated May 2013. See also <http://kingdomofhawaii.wordpress.com/embassy/international-relations/>, A/HRC/13/NGO/110; HR/GENEVA/TSIP/SEM/2003/BP.21; *Angela Poma Poma v. Peru*, Communication No. 1457/2006, available from http://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm.

⁵⁶ See <http://www.un.org/News/Press/docs/2013/ga11374.doc.htm>.

security risks and subjected to threats of anti-terrorist laws being used against them.⁵⁷ Unrepresented peoples claimed that, in many instances, they are denied the right to self-determination. A follow-up study on the modalities of achieving self-determination today was proposed.

V. Reflections

60. When the Human Rights Council adopted its resolutions 18/6 and 21/9, it deliberately established a broad mandate, aiming at synthesis and convergence. While recognizing that the prevailing international order is neither democratic nor equitable, the Independent Expert is confident that national and international governance can be made more transparent and accountable. He is encouraged by the energy and commitment of a vibrant civil society and the promise of change inherent in greater access to information and the democratization momentum of expanding social media.

61. The Independent Expert has learned from valuable analyses by other institutions, United Nations workshops, conferences and mandate holders that touch on facets of the mandate and formulate constructive proposals. The outstanding questions, however, are not so much what or how, but why there have been no effective follow-up measures, why so many reasonable proposals have remained unimplemented, why so little has changed in the power equation.⁵⁸ Why is it that revelations that shock the conscience do not result in domestic and international corrective action?

62. There is no lack of diagnoses of the manifold ills that beset the international order, coherent and even convincing diagnoses by foremost think tanks, universities and outstanding individual researchers all over the world. Obstacles to an improved world order are evident, but remedies do not materialize. Is it because the real power no longer resides in States and Governments but rather in the economy, the intelligence community, the military-industrial and financial-industrial complexes, which are neither democratic nor transparent and operate impervious to reasons other than power or profit? The answers are complex and require further research, which may contribute to future reports on the vast menu of General Assembly resolution 67/175.

63. In this context, human rights defenders, religious institutions and free thinkers have a role to play in providing a philosophical and ethical dimension to the process

⁵⁷ See press release of Ben Emmerson concerning the Mapuches of Chile, available from <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13599&LangID=S>.

⁵⁸ See Jean-Baptiste Karr: "The more things change, the more they stay the same". Chris Hedges, *The World As It Is: Dispatches on the Myth of Human Progress* (2010); Ramsey Clark, *The Fire This Time: U.S. War Crimes in the Gulf* (New York, 2002); Stéphane Hessel, *Indignez Vous* (Montpellier, 2010); Noam Chomsky, *Profit over People: Neoliberalism and Global Order* (1999), *Making the Future: Occupations, Interventions, Empire and Resistance* (2012); Samir Amin, *Maldevelopment — Anatomy of a Global Failure* (2011); Jeffrey Sachs, *The Price of Civilization* (London 2011); John Pilger, *The New Rulers of the World* (2002); Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (2007); Jean Ziegler, *Destruction massive: Géopolitique de la faim* (2011); Irene Khan, *The Unheard Truth: Poverty and Human Rights* (New York, 2009); Tzvetan Todorov, *Les ennemis intimes de la démocratie* (Paris, 2012).

of evolutionary change. What is needed is not more diagnoses but resolute action by stakeholders. Instead of "band-aid solutions": honest reform.

64. The present report identifies problems that concern many countries, intergovernmental organizations, non-State actors and civil society. It endeavours to formulate ways to move towards a culture of democracy and equity. As emphasized in the report of the Independent Expert to the Human Rights Council, domestic and international participation is essential to a democratic order. Citizens should see participation not only as a right but as a civic duty. Kofi Annan perceptively observed that a strong civil society promotes responsible citizenship and makes democratic forms of government work, while a weak civil society supports authoritarian rule, which keeps society weak.⁵⁹ Of course, this presupposes that States put in place an enabling environment for the free expression of civil society and stop assaulting the voices of marginalized and disempowered groups.

65. The Quito Communiqué of 27 March 2013 adopted by the Inter-Parliamentary Union deserves reflection: "Sustainable development is now at a crossroads. In a finite world, the perennial cycle of increasing consumption and production that is at the heart of the current economic model is no longer sustainable. Growth alone is not the answer to the social, economic and environmental challenges of our time; in fact it is becoming part of the problem. A different approach ... focuses on well-being in all its dimensions ...".⁶⁰ This statement confirms the common sense observation of the late Ernst Schumacher that infinite growth of material consumption within a finite world is an impossibility.⁶¹

66. Whereas in recent times there have been good developments and implementable proposals, a number of which are highlighted herein, the blockage by vested interests persists, obstructing change and confusing matters through obsolete dogmas about, inter alia, "efficient markets", "benign deregulation", "free-trade agreements" and accompanied by misleading arguments, weasel words, red herrings, cognitive dissonances and Orwellianisms.

67. Pursuant to article 29 of the Universal Declaration of Human Rights, emphasis should be placed on duties and obligations, not just on rights. It is a civic duty for peoples and individuals to act at both the domestic and international levels; to call for democratic elections and processes; not to keep silent when human rights are being violated and when propaganda for war is being disseminated. They should demand from Governments greater transparency and accountability, a shift of national budgets away from military expenditures and towards the promotion of human rights, an end to impunity for corruption. Civil society should also demonstrate solidarity with all victims, not only with "preferred victims", conscious of the fact that there is no monopoly on suffering, and that all victims, living and dead, share the same dignity. Competition among victims is deplorable and leads to discrimination and further injustice.

68. It may be permitted to propose a shift in thinking models that could advance the common agenda by discarding the obsolete division of rights into artificial

⁵⁹ See Kofi Annan, statement to parliamentarians in Sao Paulo, Brazil, 14 July 1998, available from <http://www.un.org/News/Press/docs/1998/19980714.sgsm6638.html>.

⁶⁰ See <http://www.ipu.org/conf-e/128/quito-comm.htm>.

⁶¹ See E. F. Schumacher, *Small Is Beautiful: A Study of Economics as if People Mattered* (Vancouver, 1999).

categories of first, second and third generation rights — with their skewed value judgements. Human rights should henceforth be redefined in functional terms, recognizing human dignity as the source of all rights, whether individual or collective. This functional paradigm reveals the interrelatedness of human rights as the convergence of enabling rights (such as the rights to peace, food, health, homeland and environment), inherent rights (such as equality and non-discrimination), procedural rights (such as access to information, freedom of expression and due process) and what could be called outcome rights, that is, the practical realization of human dignity in the form of the right to our identity, to achieve our potential and to be just who we are, free to live our transcendence, practice our faith, enjoy our own culture, preferences and opinions, without intimidation, surveillance or pressures to behave in a prescribed “politically correct” mode or endure self-censorship. The absence of this outcome right to identity and self-respect is reflected in much of the strife we see in the world today.

VI. Recommendations

69. Whereas in his initial report to the General Assembly (A/67/277), the Independent Expert preferred not to formulate recommendations, he considers it appropriate at this stage to make a number of suggestions, based on the pertinent Human Rights Council and General Assembly resolutions and resulting from consultations, responses to questionnaires and the analysis of obstacles and good practices contained in this and prior reports. Convinced that hackneyed prescriptions, platitudes or cosmetic proposals will not serve resolution 67/175, the Independent Expert offers these considerations in the spirit of the Roman Stoic philosopher Seneca: “It is not because things are difficult that we do not dare; it is because we do not dare that they are difficult” (*Non quia difficilia sunt non audemus, sed quia non audemus, difficilia sunt*):

(a) States may consider taking a fresh look at the Charter of the United Nations and activate underutilized provisions, including Articles 33, 57, 63 and 73;

(b) Efforts at reforming the United Nations with a view to making it more democratic and equitable should continue, in particular Security Council reform, so that henceforth it better reflects the needs and priorities of present and future generations instead of the 1945 world order;

(c) States should practice multilateralism and abandon unilateral actions that adversely affect a democratic and equitable international order, refraining from the threat or use of force. They should apply international law uniformly, abandon overreliance on “positivism” and efforts to circumvent treaty obligations or invent loopholes. As “nature abhors a vacuum” (Spinoza, *Ethics*), human rights law abhors “legal black holes”;

(d) The General Assembly may consider mandating the Human Rights Council to entrust one of the existing special procedures with monitoring the impact of unilateral coercive measures on the enjoyment of human rights and to ensure accountability;

(e) States should ratify the individual complaints procedures of the United Nations human rights treaties, adhere to and utilize the inter-State complaints procedures, and globalize the reach of the International Criminal Court;

(f) States should revise their budgetary priorities away from military expenditures and into the promotion and protection of human rights for all. In so doing, States should ensure fiscal and budget transparency and facilitate participation by civil society in decision-making processes;

(g) States should review their legislation and practice, identify endemic obstacles to democratic processes, and adopt corrective measures to ensure greater popular participation. In this context, the instruments of direct democracy should be increasingly utilized, namely opinion polling, independent inquiry, popular initiative, referendum, recall and impeachment;

(h) The General Assembly should promote the equitable participation of all States in the World Bank, the International Monetary Fund and the World Trade Organization, for instance, by placing these institutions under the authority of the United Nations and subordinating them to the purposes and principles of the Charter of the United Nations, pursuant to Articles 57 and 63 thereof;

(i) The General Assembly may consider expanding the mandate of the Human Rights Council to allow the examination of reports from financial institutions and transnational corporations under the universal periodic review procedure;

(j) States should repeal legislation that intimidates and criminalizes citizens in the exercise of their rights concerning the establishment of political parties, non-governmental organizations, freedom of peaceful assembly and association, the right to access information, the right to freely debate and express one's own opinions. States should implement paragraph 49 of general comment No. 34 of the Human Rights Committee by repealing so-called "memory laws";

(k) The General Assembly may consider reviewing the rules granting consultative status to non-governmental organizations so as to enhance the opportunity of independent civil society to interact with the Human Rights Council and other United Nations bodies;

(l) The budget priorities of the United Nations should promote the prevention of armed conflict, protection of the common heritage of humankind and the realization of human rights for all. This may require an overall budget increase;

(m) The General Assembly may consider referring specific legal questions to the International Court of Justice for advisory opinions, including issues of self-determination, unilateral coercive measures, threats and use of force, and debt cancellation;

(n) The General Assembly may consider revisiting the reality of self-determination in today's world and refer to the Special Committee on Decolonization and/or other United Nations instances communications by indigenous and unrepresented peoples wherever they reside, inter alia, in

Alaska, Australia, Canada, Chile, China, the Dakotas, French Polynesia, Hawaii, Kashmir, the Middle East, the Moluccas, New Caledonia, Northern Africa, Sri Lanka and West Papua, with reference to Chapter XI of the Charter of the United Nations. The General Assembly may also consider amending its rules and procedures to allow for the participation of indigenous and non-represented peoples. Meanwhile, the Assembly should urge States to implement the Declaration on the Rights of Indigenous Peoples. It should ensure that indigenous, non-represented peoples, marginalized and disempowered peoples, and peoples under occupation have a genuine opportunity to participate in decision-making processes;

(o) The General Assembly may consider convening a conference to discuss promising initiatives such as the creation of a World Parliamentary Assembly and a World Court of Human Rights.

70. The Independent Expert thanks the secretariat of the Office of the United Nations High Commissioner for Human Rights for its professionalism, constancy and gracious support. He finds hope in the words of Arundhati Roy: "Another world is not only possible; she is on her way ... On a quiet day ... I can hear her breathing".⁶²

⁶² See <https://ccrma.stanford.edu/~peer/arundhatiRoy.html>.



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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Independence of judges and lawyers

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, in accordance with resolution 17/2 of the Human Rights Council.

* A/68/150.



Report of the Special Rapporteur on the independence of judges and lawyers

Summary

The present report focuses on the administration of justice through military tribunals. In many countries, the use of military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses perpetrated by military regimes, the independence and impartiality of the judiciary and respect for fair trial guarantees for the defendant.

The report focuses on four issues of concern, namely: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject-matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) fair trial guarantees in proceedings before military tribunals.

The Special Rapporteur on the independence of judges and lawyers addresses these concerns and proposes a number of solutions that are premised on the view that the jurisdiction of military tribunals should be restricted to offences of a military nature committed by military personnel. States that establish military justice systems should aim to guarantee the independence and impartiality of military tribunals, as well as the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. The present report is based on an analysis of international and regional human rights instruments, the jurisprudence of international and regional human rights mechanisms and responses received to a questionnaire on military justice.

I. Introduction

1. The present report is submitted in accordance with resolution 17/2 of the Human Rights Council.
2. In its resolution 19/31 on the integrity of the judicial system, the Human Rights Council called upon States that have military courts or special tribunals for trying criminal offenders to ensure that such bodies are an integral part of the general judicial system and that such courts apply due process procedures that are recognized in international law as guarantees of a fair trial. In addition, the Council invited the Special Rapporteur on the independence of judges and lawyers to take full account of that resolution in the discharge of her mandate (see paras. 8 and 10).
3. Pursuant to resolution 19/31, the Special Rapporteur sent a note verbale to Member and observer States requesting responses to a set of questions related to the administration of justice through military tribunals. The Special Rapporteur wishes to thank all States that provided written responses to the questionnaire.¹
4. The present report includes a brief outline of the activities undertaken by the Special Rapporteur in 2013 and a thematic section that focuses on the administration of justice through military tribunals and compliance with human rights law and internationally recognized standards. In particular, the following four issues are addressed: (a) the independence and impartiality of military tribunals; (b) the personal jurisdiction of military tribunals, including the question of investigation and prosecution of civilians; (c) the subject-matter jurisdiction of military tribunals, including the question of investigation and prosecution of serious human rights violations allegedly perpetrated by military personnel; and (d) the application of fair trial guarantees in proceedings before military tribunals.

II. Activities of the Special Rapporteur

5. Since she last reported to the General Assembly, the Special Rapporteur has responded to requests for official visits by Greece, the Holy See, Italy, Qatar, Swaziland, the United Arab Emirates, Ukraine and Zambia. In addition, she has sent reminders to Bangladesh, China, Fiji, Kenya, Myanmar, Nepal, the Philippines, the United States of America and Zimbabwe. The Special Rapporteur would like to thank the Government of Qatar for having invited her to visit the country.
6. The activities undertaken by the Special Rapporteur since the previous report to the General Assembly are listed in her report to the Human Rights Council (A/HRC/23/43 and Corr.1. Since then, she has participated in the activities set out below.
7. On 28 February and 1 March 2013, the Special Rapporteur attended the global thematic consultation on governance and the post-2015 development agenda organized by the United Nations Development Programme in Johannesburg, South Africa.

¹ Argentina, Austria, Belarus, Bulgaria, Burkina Faso, Colombia, the Czech Republic, Finland, France, Germany, Greece, Lebanon, Mexico, Montenegro, Peru, Romania, the Russian Federation, Spain, Switzerland, Tunisia, Ukraine and Uruguay.

8. From 15 to 25 April 2013, she undertook an official visit to the Russian Federation. A report on that visit will be presented to the Human Rights Council at its twenty-sixth session, in June 2014. The Special Rapporteur wishes to thank the Government of the Russian Federation for its cooperation.
9. From 5 to 9 May 2013, she participated in the sixty-second session of the General Assembly of the Latin American Federation of Judges and in the annual meeting of the Iberoamerican Group of the International Association of Judges, held in Santiago.
10. On 28 May 2013, the Special Rapporteur presented her annual thematic report to the Human Rights Council, which focused on legal aid (A/HRC/23/43 and Corr.1). She also presented reports on her official visits to El Salvador (A/HRC/23/43/Add.1), Pakistan (A/HRC/23/43/Add.2) and Maldives (A/HRC/23/43/Add.3), as well as on the subregional consultations on the independence of the judiciary in Central America that she convened in Panama (A/HRC/23/43/Add.4). During the twenty-third session of the Council, on 29 May, she participated as a panellist in a side event on the independence of the judiciary in the Russian Federation.
11. From 24 to 28 June 2013, the Special Rapporteur participated in the annual meeting of special procedures mandate holders and in a conference on advancing the protection of human rights, held in Vienna.
12. On 12 July 2013, she participated in several meetings of the Inter-American Commission on Human Rights, in Washington, D.C.

III. Military tribunals

13. Issues relating to the establishment and functioning of military tribunals lie at the core of the Special Rapporteur's mandate. Both the current Special Rapporteur and her predecessor, Leandro Despouy, have paid considerable attention to the question of the establishment and operation of military and special tribunals, in particular for the trial of terrorism-related cases (See A/HRC/8/4, A/HRC/11/41, A/HRC/20/19, E/CN.4/2004/60, E/CN.4/2005/60, A/61/384, A/62/207 and A/63/271).
14. The Special Rapporteur has observed that the administration of justice through military tribunals raises serious concerns in terms of access to justice, impunity for past human rights abuses, the independence and impartiality of military tribunals and respect for the fair trial rights of the accused.
15. In the present report, the Special Rapporteur addresses these concerns and proposes a number of solutions that are premised on the view that States that establish military tribunals should ensure that such tribunals are an integral part of the general judicial system and function with competence, independence and impartiality, guaranteeing the exercise and enjoyment of human rights, in particular the right to a fair trial and the right to an effective remedy. Also, their jurisdiction should be restricted to offences of a military nature committed by military personnel.

A. International legal standards

16. Article 14 of the International Covenant on Civil and Political Rights states that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. A number of regional human rights instruments include similar provisions.² As the Human Rights Committee stated in its general comment No. 32, the provisions of article 14 of the Covenant apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military.

17. Explicit references to military tribunals are found in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (sect. A, principles 2 (a) and 4 (e), and sect. L) and in the updated set of principles for the protection and promotion of human rights through action to combat impunity (see E/CN.4/2005/102/Add.1, principle 29). It is thus commonly understood that human rights standards and principles relating to the administration of justice — such as the principle of equality before courts and tribunals, the right to be tried by a competent and regularly constituted court using established legal procedures, the right to an effective remedy, the principle of legality and the right to a fair trial — fully apply to military courts.

18. In 2006, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, elaborated a set of draft principles governing the administration of justice through military tribunals (see E/CN.4/2006/58). The aim of those principles was to establish a minimum system of universally applicable rules to regulate military justice (para. 10). They were developed in consultation with human rights experts, jurists and military personnel from throughout the world, and include specific provisions relating to the establishment and functioning of military tribunals. The principles are based on the idea that military justice should be an integral part of the general judicial system (see principles 1 and 17). The principles have been positively cited in jurisprudence of the European Court of Human Rights.³

19. An important body of international jurisprudence has been developed on the basis of general human rights principles relating to the administration of justice. Human rights treaty bodies, regional human rights mechanisms and a number of special procedures mandate holders have highlighted the significant challenges that the establishment and functioning of military tribunals may pose to the full and effective realization of human rights, as set out in the International Covenant on Civil and Political Rights and other international and regional human rights instruments.

B. Nature and objectives of military tribunals

20. Over time, there has been an increasing tendency to curb the jurisdiction of military tribunals. The traditional model of military justice, according to which the person who gives the orders sits in judgement, has progressively undergone

² See the European Convention on Human Rights (art. 6), the American Convention on Human Rights (art. 8), the African Charter of Human and People's Rights (art. 7) and the Arab Charter on Human Rights (arts. 12 and 13).

³ See, for example, *Ergin v. Turkey* (No. 6), Application No. 47533/99, Judgement of 4 May 2006.

important changes, with the result that military tribunals have increasingly been incorporated, as a specialized branch, into the general justice system. Several countries have abolished the operation of military tribunals in peace time altogether and transferred the responsibility for adjudicating alleged wrongdoings by military personnel to the ordinary courts and/or disciplinary bodies.

21. In some countries, military justice systems take the form of ad hoc, special or exceptional courts, but definitions of these types of tribunals are still to be established. The nature of these tribunals should be clearly understood so as to allow for the formulation of precise definitions, thus avoiding confusion and mischaracterization. Military tribunals take various forms in different States, which makes any attempt to classify such types of military jurisdiction very difficult.⁴

22. In many military justice systems, in particular those that have evolved from the British model, a distinction exists between summary jurisdictions and more formal court-martial systems. In summary jurisdictions, commissioned officers are authorized to make a determination regarding allegations of breaches of military discipline against personnel within their chain of command either through some form of summary trial or through non-judicial procedures. In more formal court-martial systems, proceedings are presided by a military judge, have more elaborate procedural and evidentiary rules and exercise jurisdiction over more serious offences. In many national systems, an accused person can choose between a summary trial and a court martial for certain offences. A distinction can also be drawn between Anglo-American systems, which are based on courts martial convened on an ad hoc basis for individual cases, and continental European systems, which are characterized by standing courts.⁵

23. In some countries, the fundamental aim of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. According to an emblematic decision on the need for a separate military justice system,⁶ the military must be in a position to enforce internal discipline effectively and efficiently in order to maintain the armed forces in a state of readiness.⁷

24. The need for separate tribunals to enforce special disciplinary standards in the military is not, however, universally recognized. In many States, the primary purpose of military tribunals continues to be that of serving the interests of the military, rather than those of society, and military tribunals end up constituting a weapon for combating the so-called "enemy within" rather than being a tool for disciplining the troops.⁴ Indeed, recent history provides several examples of abusive military regimes that have used military tribunals as an instrument to victimize their own population and grant themselves amnesties to avoid accountability for their actions (see A/61/384).

⁴ Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations*, vol. 1 (International Commission of Jurists, Geneva, 2004), pp. 154-157.

⁵ Michael Gibson, "Military tribunals", in: *Max Planck Encyclopaedia of Public International Law*, Vol. VII (Oxford University Press, 2013).

⁶ Supreme Court of Canada, *R. v. Gagné*, decision No. 22103 of 13 February 1992.

⁷ Michael Gibson, "International human rights law and the administration of justice through military tribunals: preserving utility while precluding impunity", in *Journal of International Law and International Relations*, vol. 4, No. 1 (2008), pp. 1-48.

25. Military tribunals must be established by law and form part of the regularly constituted justice system of the State. In the present report, the term "military tribunal" is used restrictively, to refer to a court martial. Nevertheless, some of the considerations made in this report will also apply, *mutatis mutandis*, to other judicial and quasi-judicial bodies established to try military personnel and civilians.

Position of military tribunals within the structures of the State

26. The position of military tribunals within the structures of the State and their relationship with the "ordinary" judiciary vary from one country to another. In many countries, military tribunals form part of the judiciary, of which they sometimes constitute a specialized branch. In other countries, military tribunals fall outside the scope of ordinary jurisdiction, and are attached to the executive branch, often to the ministry of defence. In several countries, the ordinary judiciary retains the authority to review decisions delivered by military tribunals. To this effect, some countries establish a special military division within the supreme court or supplement regular judges with military personnel.

Composition of military tribunals

27. State practice is also heterogeneous with regard to the composition of military tribunals. In several countries, military tribunals are composed solely of active or retired members of the armed forces who have the appropriate training or law-related qualifications. In some cases, military judges are not required to have undergone any legal training. In other countries, military tribunals are made up of professional judges, who are either military or civilian judges and have military experience and knowledge of the operations of armed forces.

28. National legislation usually states that military judges should possess the same legal education and training required of civilian judges. In countries where military tribunals are administered by the ordinary justice system, civilian judges may be assisted by military personnel.

Jurisdictional powers

29. In terms of personal (*ratione personae*), territorial, temporal and subject-matter (*ratione materiae*) jurisdiction, national legislations regulate military tribunals in different ways.

30. In many countries, the personal jurisdiction of military tribunals is limited to criminal offences and breaches of military discipline allegedly committed by active members of the armed forces. In some cases, the constitution expressly prohibits military tribunals from exercising jurisdiction over persons who do not belong to the armed forces and states that such cases can only be adjudicated by ordinary courts. For instance, the Supreme Court of Justice of Colombia held, in its decision No. 20 of 5 March 1987, that the trial of civilians before military tribunals was unconstitutional.

31. Sometimes, the personal jurisdiction of military tribunals extends to include civilians who are assimilated to military personnel by virtue of their function and/or geographical presence or the nature of the alleged offence. These may include civilians who are employed by the armed forces or are stationed at or in proximity of a military installation, persons who have committed crimes that are treated as

military offences and persons who have committed crimes in complicity with military personnel. In some countries, cases concerning terrorism and other serious crimes against the State are also referred to military tribunals.

32. There is no consistency between different military legal systems with regard to what is meant by the term "military offence".⁴ Depending on the nature of the offence committed and the juridical right or interest protected under the law, the following offences are criminalized in military codes:

(a) Military offences *sensu stricto*: offences that by their nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command;

(b) Military offences *sensu lato*: offences that violate both ordinary and military juridical rights or interests, but in which the military juridical right or interest is deemed to be the overriding one;

(c) "Assimilated" ordinary offences: offences under the ordinary criminal law that are treated as military offences owing to the circumstances in which they were committed (service-related acts), such as theft of military property by a civilian employed by the military.

33. In most countries, military tribunals simultaneously exercise judicial functions and disciplinary authority and are competent to try both criminal offences and minor breaches of discipline committed by armed forces personnel. In other countries, military tribunals are only competent to dispose of disciplinary matters, while criminal matters fall under the jurisdiction of ordinary courts. Many military justice systems are based on the concept of "service-related acts", which allows military tribunals to establish jurisdiction not only over purely military offences, but also over criminal offences that have a disciplinary impact. Others restrict the jurisdiction of military tribunals to offences of a strictly military nature committed by military personnel.

34. Irrespective of the peculiarities of each national justice system, the Special Rapporteur wishes to highlight that the only purpose of military tribunals should be to investigate, prosecute and try matters of a purely military nature committed by military personnel.

IV. Challenges concerning military tribunals

A. Independence and impartiality of military tribunals

35. The concept of the independence of the judiciary is derived from the basic principles that substantiate the rule of law, in particular the principle of the separation of powers, which constitutes the cornerstone of an independent and impartial justice system. In paragraphs 18 and 19 of its general comment No. 32, the Human Rights Committee considered that the notion of a competent, independent and impartial tribunal established by law set out in article 14, paragraph 1, of the International Covenant on Civil and Political Rights designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. The Committee

underscored that the requirement of competence, independence and impartiality of a tribunal is an absolute right that is not subject to any exception.

36. The independence of military tribunals must be legally guaranteed at the highest possible level. In line with the Basic Principles on the Independence of the Judiciary, principle 1 of the draft principles governing the administration of justice through military tribunals stipulates that military tribunals, when they exist, may be established only by the Constitution or the law, respecting the principle of the separation of powers. Even when guaranteed in the constitution, the independence of the judiciary must also be ensured at the legislative level. Therefore, domestic legislation must always be in compliance with this principle (see A/HRC/11/41, para. 22).

37. In a number of countries, the constitution contains provisions concerning military tribunals. The content of those provisions, however, is heterogeneous. Some provisions simply defer the establishment and functioning of military tribunals to the ordinary law. Other provisions are more specific, seeking to regulate the jurisdictional powers of military tribunals, as well as their composition and independence.

38. The principle of the separation of powers requires that military tribunals be institutionally separate from the executive and the legislative branches of power so as to avoid any interference, including by the military, in the administration of justice. In this regard, principle 13 of the draft principles governing the administration of justice through military tribunals states that military judges should have a status guaranteeing their independence and impartiality, in particular in respect of the military hierarchy. In the commentary to this principle, it is noted that the statutory independence of military judges vis-à-vis the military hierarchy must be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges (E/CN.4/2006/58, para. 46).

39. In most countries, the independence of military judges, the modalities for their selection and appointment and their terms of office, adequate remuneration, conditions of service, pensions and age of retirement are regulated by ordinary laws. The modalities for the selection and appointment of military judges vary from one country to another. In some countries, military judges are selected from a list of qualified candidates released from military service and appointed by a judicial council or the ordinary courts. In other countries, they are selected through a competitive examination. In some cases, military judges are selected and appointed by the executive branch. State practice is also diverse regarding the tenure of military judges. In some countries, such judges are appointed for a limited period of time.

40. The Human Rights Committee has stated, in its general comment No. 32, that the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees concerning their security of tenure, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. International and regional judicial bodies have ruled in a large number of cases on military tribunals, thereby generating jurisprudence on the compliance of such tribunals with the necessary requirements of independence and impartiality.

41. In *Martin v. the United Kingdom*, the European Court of Human Rights held that in order to establish whether a tribunal can be considered independent, regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question of whether the body presents an appearance of independence. In that case, the Court concluded that while the participation of civilians as ordinary members of the court martial may have contributed somewhat to its independence, they did not have sufficient influence over the proceedings as a whole, including over the military members of the court martial, to satisfy the independence and impartiality requirements of article 6 of the European Convention on Human Rights.⁸ In this judgement, the Court makes reference to *Findlay v. the United Kingdom*, with respect to which the Court considered that there were fundamental flaws in the court-martial system in the United Kingdom of Great Britain and Northern Ireland because of the role of the convening military officer.⁹

42. With regard to convening officers, the Special Rapporteur notes that, depending on their role and function, they can have a considerable impact on the independence and impartiality of military tribunals, for example in cases where the convening authority has the power to dissolve a tribunal or otherwise influence the outcome of a trial. The role and functions of convening officers, and safeguards against any such interference, must be clearly defined by legislation so that, on the one hand, convening officers can act independently from external pressure and, on the other hand, they are prevented from acting in ways that might hinder the independent and impartial administration of justice.

43. In *Palamara Iribarne v. Chile*, the Inter-American Court of Human Rights held that the organic structure and composition of military tribunals in Chile implies that they are made up of active-duty military members who are hierarchically subordinate to higher-ranked officers through the chain of command, that their designation does not depend on their professional skills and qualifications to exercise judicial functions, that they do not have sufficient guarantees that they will not be removed and that they have not received the legal education required to sit as judges or serve as prosecutors. All this implies that said courts lack independence and impartiality.¹⁰ In *Castillo Petruzzi v. Peru*, the Court noted that the fact that members of the Supreme Court of Military Justice, the highest body in the military judiciary in Peru, were appointed by the minister of the pertinent sector was enough to call the independence of the military judges into serious question.¹¹

44. While the independence of the judiciary encompasses institutional and individual aspects, the requirement of impartiality relates mainly to the latter, namely to the specific conduct of the judge. The requirement of impartiality has two aspects. Firstly, judges should perform their judicial duties without bias or prejudice and should not harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Secondly, judges must appear to a reasonable observer to be impartial,

⁸ *Martin v. the United Kingdom*, application No. 40426/98, Judgement of 24 October 2006, paras. 41 and 51.

⁹ *Findlay v. the United Kingdom*, application No. 22107/93, Judgement of 25 February 1997.

¹⁰ *Palamara Iribarne v. Chile*, Judgement of 22 November 2005, Series C No. 135.

¹¹ *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, Series C No. 52.

and act in such a way as to maintain and enhance the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.¹²

45. In *Ergin v. Turkey*, in which a newspaper editor was tried by a military tribunal for inciting the evasion of military service, the European Court of Human Rights held that situations in which a military tribunal has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. The Court considered that a judicial system in which a military tribunal is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance that should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.¹³

B. Trial of civilians by military tribunals

46. The Special Rapporteur on the independence of judges and lawyers has stated on several occasions that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism is a regrettably common practice that runs counter to all international and regional standards and established case law (see, for example, E/CN.4/2004/60, para. 60). This observation is also reflected in the findings of other special procedures mandate holders.¹³

47. International human rights treaties do not address the trial of civilians by military tribunals explicitly. Nevertheless, a number of soft law instruments and the jurisprudence of international and regional mechanisms show that there is a strong trend against extending the criminal jurisdiction of military tribunals over civilians.

48. The Basic Principles on the Independence of the Judiciary stipulate that everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals (principle 5).

49. In line with this position, principle 5 of the draft principles governing the administration of justice through military tribunals states that military courts should, in principle, have no jurisdiction to try civilians and that, in all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. In the commentary to that principle, it is noted that the practice of trying civilians in military tribunals presents serious problems as far as the equitable, impartial and independent administration of justice is concerned, and is often justified by the need to enable exceptional procedures that do not comply with normal standards of justice (see E/CN.4/2006/58, para. 20).

¹² See value 2 of the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, annex).

¹³ Alex Conte, "Approaches and responses of the UN human rights mechanisms to exceptional courts and human rights commissions", in *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective*, Fionnuala Ní Aoláin and Oren Gross, eds. (Cambridge University Press, 2013).

50. A number of other international instruments also recommend that States restrict the jurisdiction of military tribunals over civilians in favour of ordinary jurisdiction.¹⁴

51. In paragraph 22 of its general comment No. 32, the Human Rights Committee noted that while the International Covenant on Civil and Political Rights does not prohibit the trial of civilians in military or special courts, it nonetheless requires that such trials be in full conformity with the requirements of article 14 of the Covenant and that its guarantees be not limited or modified because of the military or special character of the court concerned. Furthermore, the Committee clarified that trials of civilians by military or special courts should be exceptional, in other words they should be limited to cases where the State party to the Covenant can show that resorting to such trials is necessary and justified by objective and serious reasons and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials. It is therefore incumbent on the State party resorting to military tribunals to try civilians to demonstrate, with regard to a specific class of individuals, the following: (a) that the regular civilian courts are unable to undertake the trials; (b) that other, alternative, forms of special or high-security civilian courts are inadequate for the task; and (c) that recourse to military tribunals ensures that the rights of the accused are fully protected pursuant to article 14 of the Covenant. In its concluding observations on reports submitted by States parties under article 40 of the Covenant, the Committee has gone further still by calling on Governments in several countries to prohibit the trial of civilians before military tribunals.¹⁵

52. The jurisprudence of the Human Rights Committee shows that the mere invocation of domestic legal provisions for the trial by military tribunal of certain categories of serious offences does not constitute an argument under the Covenant to justify recourse to such courts. In the absence of a specific justification as to the necessity of trying a specific class of civilians in military tribunals, the Committee has invariably found that such trials are inconsistent with the guarantees set out in article 14 of the Covenant.¹⁶

53. Indeed, State practice shows a tendency towards limiting the personal jurisdiction of military tribunals to criminal offences and breaches of discipline allegedly committed by active members of the armed forces. Exceptions with regard to civilians who are assimilated to military personnel tend to be crafted and interpreted narrowly (see A/63/223, para. 26).

¹⁴ See, for example, the updated set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1, principle 29), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (section L, para. (c)), the report of the Working Group on Arbitrary Detention (E/CN.4/2000/4, paras. 67 and 68) and Human Rights Council resolution 19/31.

¹⁵ See, for example, the concluding observations on the reports submitted by Slovakia (CCPR/C/79/Add.79, para. 20), Lebanon (CCPR/C/79/Add.78, para. 14), Chile (CCPR/C/CHL/CO/5, para. 12), Tajikistan (CCPR/CO/84/TJK, para. 18) and Ecuador (CCPR/C/ECU/CO/5, para. 5).

¹⁶ See: *Ebenezer Derek Mbongo Akwanga v. Cameroon*, CCPR/C/101/D/1813/2008, 19 May 2011; *Abdelhamid Benhadj v. Algeria*, CCPR/C/90/D/1173/2003, 26 September 2007; *Salim Abbassi v. Algeria*, CCPR/C/89/D/1172/2003, 28 March 2007; and *Kurbanova v. Tajikistan*, CCPR/C/79/D/1096/2002, 6 November 2003.

54. The Special Rapporteur would like to highlight that the trial of civilians by military or special courts has raised serious issues in relation to the independent administration of justice through military tribunals and respect for the guarantees stipulated in article 14 of the Covenant. She therefore believes that the jurisdiction of military tribunals should be restricted to offences of a strictly military nature committed by military personnel.

55. The Special Rapporteur also believes that the concept of "necessity" identified by the Human Rights Committee to justify the resort to military tribunals to try civilians presupposes that ordinary courts are unable to exercise jurisdiction vis-à-vis certain categories of individuals, such as civilian dependants of military personnel posted abroad and civilian persons accompanying the armed forces, such as contractors, cooks and translators.¹⁷ In such cases, she considers that the existence of such jurisdiction may be required to prevent situations of de facto impunity arising in cases where civilians accompany the armed forces on extraterritorial deployments in States with weak or dysfunctional legal systems.⁷ Nevertheless, the burden of proving the existence of exceptional circumstances requiring the trial of civilians in a military court rests with the sending State.

56. Moreover, the Special Rapporteur strongly believes that the State has the obligation to guarantee the independence, impartiality, competence and accountability of the ordinary courts in order to enable them to adhere fully to applicable human rights law and standards, including fair trial and due process guarantees. Failure to do so cannot be used as a justification for the use of military or special tribunals to try civilians under exceptional circumstances. Therefore, in no case should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory.

C. Nature of offences under the jurisdiction of military tribunals

57. One of the most complex aspect of military tribunals relates to the subject-matter jurisdiction of such tribunals, in other words to the types of offences that fall under their jurisdiction. As is the case with personal jurisdiction, international human rights treaties do not define the scope of the *ratione materiae* jurisdiction of military tribunals, nor do they provide a definition of what constitutes a military offence or prescribe the kinds of criminal offences or breaches of military discipline that should fall within military jurisdiction.

58. The following international and regional instruments, among others, contain references to the subject-matter jurisdiction of military tribunals: the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Protection of All Persons from Enforced Disappearance, the updated set of principles for the protection and promotion of human rights through action to combat impunity, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and the draft principles governing the administration

¹⁷ The Special Rapporteur notes that the legal status of this category of individuals is usually governed by a status-of-forces agreement, which addresses, inter alia, the question of which State would assume primary and secondary jurisdiction in relation to criminal and other offences allegedly committed by civilians accompanying the armed forces in the territory of the receiving State.

of justice through military tribunals. In particular, the latter establish that the jurisdiction of military tribunals should be limited to offences of a strictly military nature committed by military personnel (principle 8).

59. In the commentary to the draft principles governing the administration of justice through military tribunals it is noted that such jurisdiction should not constitute derogation in principle from ordinary law, corresponding to a jurisdictional privilege or a form of justice by one's peers. Rather, it should remain exceptional and apply only to the requirements of military service, in other words to situations where national courts are prevented from exercising jurisdiction for practical reasons (e.g. remoteness of the action), while the local court that would be territorially competent is confronted with jurisdictional immunities (E/CN.4/2006/58, para. 29).

60. The jurisprudence of human rights treaty bodies, special procedures mandate holders and regional human rights mechanisms on this issue tends to confine the jurisdiction of military tribunals to purely disciplinary types of military offences, rather than to offences of a criminal nature.⁴ In particular, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed the so-called "principle of functionality", which limits military jurisdiction to offences committed in relation to the military functions, thereby limiting it to military offences committed by members of the armed forces (see A/61/384, para. 26).

61. Military practitioners note, however, that a criminal offence (a rape or a theft, for example) committed by a soldier is no less a breach of discipline than a purely military offence such as insubordination or disobedience. Hence, many military justice systems do not make any distinction between a criminal offence and a breach of discipline. In these systems, which are based on the concept of "service offence", military tribunals simultaneously exercise judicial functions and disciplinary authority over military personnel.⁵

62. An analysis of State practice also shows a trend towards restricting the *ratione materiae* jurisdiction of military tribunals to criminal offences and breaches of military discipline committed by military personnel. Military tribunals in Argentina can exercise jurisdiction only in relation to "strictly military crimes" committed by military personnel in the discharge of their duties, and only in exceptional circumstances, for example when civilian courts are unable to undertake the trial, which constitutes a good practice that should be highlighted.

Trial of military personnel accused of serious human rights violations

63. With regard to the *ratione materiae* jurisdiction of military tribunals, an essential issue that is the subject of disagreement among human rights and military practitioners concerns the competence of military tribunals to try military personnel accused of offences involving serious human rights violations.

64. A few human rights instruments include specific provisions on this issue. The updated set of principles for the protection and promotion of human rights through action to combat impunity establishes that the jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of

serious crimes under international law, of an international or internationalized criminal court (principle 29).

65. The Inter-American Convention on Forced Disappearance of Persons, in its article IX, and the Declaration on the Protection of All Persons from Enforced Disappearance, in its article 16, both require that persons allegedly responsible for enforced disappearance be tried by ordinary courts, to the exclusion of all other special jurisdictions, in particular military tribunals. The Committee against Torture and the Special Rapporteur on torture have also reaffirmed that individuals accused of torture should not be tried before military tribunals (see A/56/156, para. 39 (j), and CAT/C/PER/CO/4, para. 16 (a)).

66. According to principle 9 of the draft principles governing the administration of justice through military tribunals, in all circumstances, the jurisdiction of military tribunals should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

67. In the commentary to principle 9, it is explained that the rationale for this provision is twofold. Firstly, the commission of human rights violations is outside the scope of the duties performed by military personnel (A/61/384). Secondly, military tribunals cannot be trusted to try such grave offences properly since they may be tempted to shield military perpetrators of serious human rights abuses, in particular senior military officers. Also according to the commentary, a reserve of jurisdiction in favour of ordinary courts would constitute a decisive step towards avoiding all forms of impunity and enable the rights of victims to be taken fully into account at all stages of the proceedings (E/CN.4/2006/58, para. 32).

68. The doctrine and jurisprudence of human rights treaty bodies support this principle. In its concluding observations on the report submitted by Colombia, for example, the Human Rights Committee noted with concern that the military justice system continued to assume jurisdiction in cases of extrajudicial executions allegedly perpetrated by members of the security forces and requested the Government of Colombia to ensure that serious human rights violations be impartially investigated by the regular justice system and remain clearly and effectively outside the jurisdiction of military tribunals (CCPR/C/COL/CO/6, para. 14). The Committee has made similar recommendations in its concluding observations on reports submitted by Peru (CCPR/C/PER/CO/5, para. 17), Mexico (CCPR/C/MEX/CO/5, para. 11), the Russian Federation (CCPR/C/RUS/CO/6, para. 14) and the Central African Republic (CCPR/C/CAF/CO/2, para. 12), among others. In a recent case, the Committee restated that military criminal jurisdictions should have a restrictive and exceptional scope, and referred to principle 9 of the draft principles governing the administration of justice through military tribunals to support its reasoning.¹⁸

69. Similarly, the former Special Rapporteur on the independence of judges and lawyers noted that military jurisdiction over offences involving allegations of human rights violations constitutes a serious obstacle for many victims of human rights violations in their quest for justice (A/61/384, para. 18). A number of other

¹⁸ *Kholodova v. Russian Federation*, CCPR/106/D/1548/2007, 11 December 2012.

special procedures mandate holders have reached similar conclusions (see E/CN.4/2005/65, para. 375, E/CN.4/1998/38/Add.2 and A/HRC/16/51/Add.3).

70. Military practitioners, however, contend that while it is certainly true that the commission of human rights violations would not properly fall within the scope of the duties of military personnel, neither is the commission of such ordinary crimes as murder, rape, fraud or theft properly within the scope of military duties.⁵ They contend that offences concerning serious human rights violations constitute at the same time crimes and breaches of discipline and should therefore be susceptible to being tried by a military tribunal, since the *raison d'être* of military justice is to enforce disciplinary standards in the military.

71. Notwithstanding this view, the widespread human rights abuses perpetrated by military juntas in Latin American countries have led many countries in the region to curb the competence of military tribunals to try military personnel who have committed human rights violations. The Special Rapporteur wishes to highlight two examples, from Colombia and Mexico, which she considers to be good practices: in Colombia, article 221 of the Constitution was amended to exclude serious human rights violations such as genocide, forced disappearance, extrajudicial execution, sexual violence, torture and forced displacement from military jurisdiction; in Mexico, the Supreme Court issued a historic ruling in August 2012 limiting the use of the military justice system for trying cases involving alleged human rights abuses.¹⁹

D. Fair trial guarantees in proceedings before military tribunals

72. The draft principles governing the administration of justice through military tribunals contain a number of provisions on fair trial guarantees in proceedings before military tribunals. According to principle 2, military tribunals must in all circumstances respect and apply the principles of international law relating to a fair trial, as codified in article 14 of the International Covenant on Civil and Political Rights and corresponding provisions of regional human rights treaties. Other principles make reference to the right to a competent, independent and impartial tribunal (principle 13), the right to a public hearing (principle 14), the right of the defence and the right to a just and fair trial (principle 15) and the right of appeal before civilian courts (principle 17).

73. Human rights mechanisms have often expressed concern about violations of or the lack of sufficient fair trial guarantees in proceedings before military tribunals. For instance, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed concern

¹⁹ The Supreme Court of Justice of Mexico declared article 57, section II, paragraph (a), of the Code of Military Justice to be non-compliant, as it considered it to be inconsistent with the provisions of articles 2 and 8 (1) of the American Convention on Human Rights, since, following the jurisprudence of the Inter-American Court of Human Rights, the bodies or courts competent to hear and punish those responsible for the crimes committed by the military, in the exercise of their functions or on the grounds of them, to the detriment of civilians, are the ordinary criminal courts and not the courts of the military jurisdiction, thereby also giving legitimacy to the victim and family members to petition for *amparo* or challenge the decisions of military courts that unduly deemed themselves competent. Thus, the military jurisdiction was narrowed down to cases involving offences against military discipline not involving a civilian.

about the lower fair trial guarantees that often characterize military and special courts in practice owing to prolonged periods of pre-charge and pretrial detention, with inadequate access to counsel, intrusion into the attorney-client confidentiality and strict limitations on the right to appeal and bail (A/63/223, para. 27).

Right to defence

74. The right of the accused to legal representation of his or her choice assumes particular relevance with regard to proceedings before military tribunals. In line with the International Covenant on Civil and Political Rights, principle 15 (e) of the draft principles governing the administration of justice through military tribunals states that everyone charged with a criminal offence has the right to defend himself or herself in person or through legal assistance of his or her own choosing and the right to be informed of the right to counsel and to receive legal assistance if he or she does not have sufficient means and the interests of justice so require.

75. In the commentary to principle 15, it is noted that the principle of free choice of defence counsel includes the right of accused persons to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer (E/CN.4/2006/58, para. 53). It has been observed, however, that the ability of accused persons to engage legal counsel of their choosing has been limited or excluded in some circumstances, for example when a military tribunal exercises jurisdiction extraterritorially.²⁰ In this regard, the Special Rapporteur wishes to underline that the free choice of defence counsel must be guaranteed in all circumstances and any kind of restriction of this right should be extremely exceptional, so as not to hamper the credibility of the military justice system.

76. In some countries, persons charged with a military criminal offence have the right to choose whether to be defended by a civilian or a military lawyer. In many States, however, there are no military lawyers. In Finland, for example, a member of the armed forces cannot serve as defence lawyer, since Government officials cannot hold positions or act in a manner that might result in a conflict of interest. In some States, the right to opt for a legal counsel of one's choosing may de facto be limited or excluded in exceptional circumstances, for example when the alleged crime is committed and the trial takes place outside the territory of the State. In these cases, the defence of the accused person may need to be assumed by a competent and independent military lawyer. Furthermore, the right to be assisted by a lawyer may be excluded in the case of summary trials to try minor disciplinary-type offences that are not of a criminal nature within the meaning of article 14, paragraph 3, of the International Covenant on Civil and Political Rights.

77. The Special Rapporteur stresses, in accordance with the commentary on principle 15 of the draft principles governing the administration of justice through military tribunals, that even if a military lawyer is provided to the person facing charges before a military tribunal, the possibility for the defendant to opt for a civilian lawyer must be fully guaranteed. Moreover, when the person accepts a military lawyer as counsel, the same safeguards and guarantees provided to the civilian legal profession must be ensured so as to allow the military lawyer to act

²⁰ See, for example, *Artico v. Italy* (1980) European Court of Human Rights 4, para. 33; *Imbrioscia v. Switzerland* (1993) European Court of Human Rights 56, para. 38; and *Daud v. Portugal* (1998) European Court of Human Rights 27, para. 38.

with objectivity, efficiency and independence, thus providing adequate and unbiased counsel.

78. Furthermore, the right to communicate with one's counsel requires that the accused be granted prompt access to counsel, that counsel be available at all stages of proceedings, including during interrogations and prior to appearance in court, that communications with counsel be confidential and privileged and that an interpreter be provided whenever necessary. In most countries, the accused person has right of access to legal counsel immediately after being arrested. In others, the right of the accused to meet with his or her lawyer in private can only be exercised when the person is brought before the judge. In this regard, the Special Rapporteur wishes to recall principle 7 of the Basic Principles on the Role of Lawyers, according to which Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than 48 hours from the time of arrest or detention.

Equality of arms

79. For a criminal trial to be fair, it is important that the principle of equality of arms between the prosecutor and the defence be respected. Thus, every party must be given the opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds. Where distinctions apply, they must be proportional and sufficiently counterbalanced to ensure that the accused receives a fair trial, and must not entail actual disadvantage or other unfairness to the defendant (see Human Rights Committee general comment No. 32, para. 13).

80. In criminal proceedings before military tribunals, violations of this principle may occur, for example, when the prosecution fails to disclose to the defence all material evidence in its possession for or against the defendant on account of the classified character of such information. In this regard, the draft principles governing the administration of justice through military tribunals provide for military secrecy to be invoked only when it is strictly necessary to protect information concerning national defence and never in order to obstruct the course of justice or violate human rights (principle 10).

81. The Special Rapporteur would like to point out that the lack of disclosure may affect the overall fairness of the trial. The necessity of non-disclosure should be decided by a court rather than the prosecution, so as to ensure respect for the principle of equality of arms and the right to prepare one's defence.²¹ The authorities and the courts must also keep under review, throughout the proceedings, the appropriateness of non-disclosure in the light of the significance of the

²¹ See *Rowe and Davis v. United Kingdom* (28901/95), Grand Chamber of the European Court of Human Rights (2000), sects. 53-67; *McKeown v. United Kingdom* (6684/05), European Court of Human Rights (2011), sect. 45-55; *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights (2003), sect. 179; *Jasper v. United Kingdom* (27052/95), Grand Chamber of the European Court of Human Rights (2000), sects. 42-58; and *Botmeh and Alami v. United Kingdom* (15187/03), European Court of Human Rights (2007), sects. 41-45.

information, the adequacy of the safeguards and the impact on the fairness of the proceedings as a whole.²²

Right of appeal

82. Article 14, paragraph 5, of the International Covenant on Civil and Political Rights stipulates that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. In its general comment No. 32, the Human Rights Committee delineated the essential features of this right: substantive review of conviction and sentence and effective access to the appellate system. In paragraph 45 of the general comment, the Committee held that the term "according to law" relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant.

83. The right of appeal should be available to all persons convicted of a crime, including those who have been convicted by military tribunals. In *Mansaraj et al. v. Sierra Leone*, the Human Rights Committee held that the execution of 12 former members of the armed forces of Sierra Leone only one week after their conviction by a court martial, without any right of appeal and disregarding the Committee's order of interim measures, constituted a serious and blatant violation of the right of appeal (see CCPR/C/72/D/839/1998).

84. According to the draft principles governing the administration of justice through military tribunals, the authority of military tribunals should be limited to ruling in first instance and recourse procedures, in particular appeals, should be brought before the civil courts (principle 17). The rationale of this provision is to ensure that military tribunals are integrated in the general justice system, so as to avoid a parallel hierarchy of military tribunals separate from ordinary law (see E/CN.4/2006/58, para. 56).

85. In most countries where a military justice system exists, persons convicted of a military crime have the right to appeal the conviction before a higher tribunal, either a military or a civilian court of appeal. Sentences handed down by courts of second instance may be appealed further before the supreme court, which is in some cases integrated by military personnel. In some countries, the decisions of military tribunals cannot be appealed and the only remedy available is recourse to a court of cassation, where there is one.

V. Conclusions

86. The integrity of the justice system is a precondition for democracy and the rule of law. The justice system must be structured on the pillars of independence, impartiality, competence and accountability in order for the

²² See *Rowe and Davis v. United Kingdom* (28901/95), Grand Chamber of the European Court of Human Rights (2000), sects. 60-67. See also rules 81 to 84 of the International Criminal Court Rules of Procedure and Evidence; *Prosecutor v. Katanga and Ngudjolo* (ICC-01/04-01/07-475), International Criminal Court Appeals Chamber, Judgement on the appeal of the Prosecutor against the decision of Pretrial Chamber I entitled "First decision on the prosecution request for authorization to redact witness statements" (13 May 2008), sects. 60-73.

principles of independence of the judiciary and the separation of powers can be duly respected.

87. Jurisprudence of the Human Rights Committee and of international and regional human rights mechanisms in relation to military tribunals has pointed to several serious challenges presented by military tribunals with regard to their independence and impartiality, the trial of civilians, the trial of military personnel accused of serious human rights violations and fair trial guarantees.

88. Military tribunals, when they exist, must be an integral part of the general justice system and operate in accordance with human rights standards, including by respecting the right to a fair trial and the due process guarantees set out, *inter alia*, in articles 9 and 14 of the International Covenant on Civil and Political Rights.

89. Because they have the distinct objective of dealing with matters related to military service, military tribunals should have jurisdiction only over military personnel who commit military offences or breaches of military discipline, and then only when those offences or breaches do not amount to serious human rights violations. Exceptions are to be made only in exceptional circumstances and be limited to civilians abroad and assimilated to military personnel.

90. In order to ensure the independence and integrity of the justice system, States have the obligation to guarantee that ordinary tribunals are independent, impartial, competent and accountable and therefore able to combat impunity. Failure to do so cannot be used as a justification for the use of military or special tribunals to try civilians.

VI. Recommendations

91. The Special Rapporteur wishes to make the following recommendations with the aim of assisting States in ensuring that, where military justice systems exist, military tribunals administer justice in a manner that is fully compliant with international human rights law and standards.

A. Administration of justice through military tribunals

92. The draft principles governing the administration of justice through military tribunals should be promptly considered and adopted by the Human Rights Council and endorsed by the General Assembly.

B. Independence and impartiality of military tribunals

93. The independence of military tribunals must be legally guaranteed at the highest possible level. In line with the Basic Principles on the Independence of the Judiciary and the draft principles governing the administration of justice through military tribunals, the independence of military tribunals and their inclusion within the general administration of justice system of the State must be guaranteed in the constitution or a fundamental law when the State has no written constitution.

94. Domestic legislation should include specific guarantees to protect the statutory independence of military judges vis-à-vis the executive branch and the military hierarchy and to enhance, in line with the Bangalore Principles of Judicial Conduct, the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

95. In order to safeguard the independence of military judges, their status, including their security of tenure, adequate remuneration, conditions of service, pensions and the age of retirement, should be determined by law. In particular, military judges should have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exist. Also, they should be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity, transparency and impartiality set out in the constitution or the law.

96. The role and functions of convening officers and safeguards protecting the independence and impartiality of military tribunals must be clearly defined by legislation so that convening officers can, on the one hand, act independently from external pressure and, on the other hand, be prevented from acting in ways that might hinder the independent and impartial administration of justice.

97. Domestic law should identify objective criteria for the selection of military judges. Military judges should be selected on the basis of their integrity, ability, qualifications and training. Any method used to select judges should include safeguards against judicial appointments for improper motives. In this regard, States should consider establishing an independent authority charged with the selection of military judges. Competitive examinations conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process.

C. Nature of offences under the jurisdiction of military tribunals

98. As a specialized jurisdiction aimed at serving the particular disciplinary needs of the military, the *ratione materiae* jurisdiction of military tribunals should be limited to criminal offences of a strictly military nature, in other words to offences that by their own nature relate exclusively to legally protected interests of military order, such as desertion, insubordination or abandonment of post or command.

99. States should not resort to the concept of service-related acts to displace the jurisdiction belonging to the ordinary courts in favour of military tribunals. Ordinary criminal offences committed by military personnel should be tried in ordinary courts, unless regular courts are unable to exercise jurisdiction owing to the particular circumstances in which the crime was committed (i.e. exclusively in cases of crimes committed outside the territory of the State). Such cases should be expressly provided for by the law.

D. Trial of civilians in military courts

100. Military tribunals, when they exist, should only try military personnel accused of military offences or breaches of military discipline.

101. The trial of civilians by military tribunals should be prohibited, subject only to the narrow exception identified in paragraph 102 below. In no case should a military tribunal established within the territory of the State exercise jurisdiction over civilians accused of having committed a criminal offence in that same territory.

102. The trial of civilians in military courts should be limited strictly to exceptional cases concerning civilians assimilated to military personnel by virtue of their function and/or geographical presence who have allegedly perpetrated an offence outside the territory of the State and where regular courts, whether local or those of the State of origin, are unable to undertake the trial.

103. The burden of proving the existence of such exceptional circumstances rests with the State. Such reasons must be substantiated in each specific case, since it is not sufficient for the national legislation to allocate certain categories of offence to military tribunals *in abstracto*. Such exceptional cases should be expressly provided for by the law.

104. States have the duty to ensure that ordinary courts are able to combat impunity. When they fail to do so, this cannot justify the existence of exceptional circumstances requiring the trial of civilians in a military court.

105. In all cases before military tribunals, the State must take all necessary measures to ensure that the proceedings are in full conformity with international human rights law and standards and with the requirements for ensuring fair trial and due process guarantees, in particular those set out in articles 9 and 14 of the International Covenant on Civil and Political Rights.

E. Trial of persons accused of serious human rights violations

106. The jurisdiction of ordinary courts should prevail over that of military courts to conduct inquiries into alleged offences involving serious human rights violations and to prosecute and try persons accused of such crimes, in all circumstances, including when the alleged acts were committed by military personnel.

F. Fair trial and due process guarantees in proceedings before military tribunals

107. Military tribunals and the proceedings before them should, in all circumstances, respect and apply the principles of international law relating to a fair trial. Any restrictions to fair trial requirements and due process guarantees must be provided for by the law, justified by objective reasons, be proportional and never undermine the overall right to a fair trial.

108. States should adopt all appropriate measures to ensure that military lawyers, especially when they are officially appointed by a military tribunal or the executive branch, meet the necessary requirements of independence and competence set out in the Basic Principles on the Role of Lawyers.

109. Proceedings before military tribunals should be carried out in accordance with the principle of equality of arms. States should adopt all appropriate measures to ensure that the same procedural rights are provided to all parties, unless distinctions are based on law and can be justified on objective and reasonable grounds, and that they do not entail actual disadvantage or other unfairness to the defendant.

110. All persons convicted by a military tribunal have the right to have their conviction and sentence reviewed by a higher civilian tribunal. States should determine the modalities by which such review is to be carried out, as well as which court should be responsible.